
Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

JAMES O'NEILL

Plaintiff-Respondent

against

GENERAL FILM COMPANY

Defendant-Appellant

Case on Appeal

DITTENHOEFER, GERBER & JAMES

Attorneys for Plaintiff-Respondent

96 Broadway

New York City

NATHAN BURKAN

Attorney for Defendant-Appellant

165 Broadway

New York City

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Supreme Court

APPELLATE DIVISION, FIRST DEPARTMENT

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JAMES O'NEILL,
Plaintiff-Respondent,
against
GENERAL FILM COMPANY,
Defendant-Appellant.

Statement Under Rule 41

This action was commenced on the 18th day of November, 1912, by the service of the summons and complaint upon the defendant herein.

The plaintiff appeared by Dittenhoefer, Gerber & James, his attorneys. The defendant appeared by Nathan Burkan, its attorney.

Issue was joined by service of the answer of the defendant on the 7th day of December, 1912.

The names of the parties are given in full above and there has been no change of parties or attorneys pending this action.

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Notice of Appeal to Appellate Division

SUPREME COURT

NEW YORK COUNTY

JAMES O'NEILL,

Plaintiff,

against

GENERAL FILM COMPANY,

Defendant.

5

SIRS:

PLEASE TAKE NOTICE that the defendant above-named hereby appeals to the Appellate Division of the Supreme Court in and for the First Department from the interlocutory judgment of this court entered in the office of the Clerk of the County of New York on the 26th day of April 1915, and from each and every part of said judgment as well as from the whole thereof.

Dated, May 11th, 1915.

6

NATHAN BURKAN,

Attorney for Defendant,

165 Broadway,

Borough of Manhattan,

New York City.

To:

William F. Schneider, Esq.,

Clerk of the County of New York.

Dittenhoefer, Gerber & James, Esq.,

Attorneys for Plaintiff,

96 Broadway,

New York City.

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Summons

NEW YORK SUPREME COURT

COUNTY OF NEW YORK

JAMES O'NEILL,

Plaintiff,

against

GENERAL FILM COMPANY,

Defendant.

Trial desired
in New York
County.

Summons.

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To the above named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, New York, November 18th, 1912.

9

DITTENHOEFER, GERBER & JAMES,

Plaintiffs' Attorneys

Office and Post Office Address,

No. 96 Broadway,

Borough of Manhattan,

New York City.

10

Bill of Complaint

NEW YORK SUPREME COURT

COUNTY OF NEW YORK

JAMES O'NEILL,

Plaintiff,

against

GENERAL FILM COMPANY,

Defendant.

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The plaintiff, complaining of the defendant alleges:

I. That he is an actor by profession, having been engaged in that business more than forty years, and that he is the owner of a certain dramatic composition known as "Monte Cristo," which said dramatic composition was originally composed and written in the English language by Charles Fechter and Arthur LeClereq.

12 II. That the defendant, General Film Company is a corporation duly organized and existing under the laws of the state of Maine, having an office for the transaction of business at No. 200 Fifth Avenue in the Borough of Manhattan, City of New York, and is engaged among other things, in the business of renting and distributing films for motion pictures, and among other motion picture films, that it has and is distributing a motion picture film entitled "Monte Cristo".

III. That in the year 1870-1871, the said Charles Fechter was employed by one, Arthur

Bill of Complaint

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Cheney, as a leading actor and director of the Globe Theatre in Boston, and while the said Charles Fechter was so employed by the said Arthur Cheney, the said Charles Fechter, assisted by the said Arthur LeClereq at the request of and for a consideration paid by said Cheney to him, adapted and arranged for said Cheney, the said drama "Monte Cristo" from a novel by Alexander Dumas, entitled "The Count of Monte Cristo", for dramatic production upon the stage, and the said play was, thereafter produced in the Globe Theatre in Boston, and in other theatres, with great success. That the said adaptation became known as the "Fechter Version" of "Monte Cristo," and was the sole property of the said Arthur Cheney.

IV. Upon information and belief plaintiff alleges that the said Arthur Cheney never published the said adaptation, nor were any copies of the same ever sold or offered for sale, nor was the said adaptation ever copyrighted under the laws of the United States, or of any other country, nor was the same ever dedicated to the public, but the said adaptation remained in manuscript form.

V. That thereafter and on or about the 31st day of August, 1887, the said Arthur Cheney sold, assigned, transferred and set over to one, John Stetson, the said manuscript of the said dramatic composition "Monte Cristo", and delivered the said manuscript to said Stetson, and the said John Stetson then became the sole and exclusive owner of the same, and of the right to produce the same and to license others to produce the same.

VI. That the said John Stetson never published said manuscript, or offered copies of the same for sale, and did not in any way dedicate the same to the public, or make any form of dedication, neither was the said adaptation ever copyrighted under the laws of the United States, or of any other country, and the said play remained in manuscript form.

17 VII. That thereafter, and on or about the 15th day of June, 1885, the said John Stetson duly sold, transferred, assigned and set over to the plaintiff, the manuscript of the said play, "Monte Cristo" and all his right, title and interest in the same, and delivered the said manuscript to plaintiff, and plaintiff then became and still is the sole and exclusive owner of the said play "Monte Cristo", and of the right to produce the same, and to license others to produce the same.

18 VIII. That the plaintiff never published the said play, or sold or offered for sale copies of the same, nor did he in any manner dedicate the same to the public, nor did he copyright the said play under the laws of the United States or any other country. That the said play never became public property and has always been kept in manuscript form.

IX. That the said play "Monte Cristo" has been produced almost continuously since it was first written by the said Charles Fechter and Arthur LeClereq, and the plaintiff has played the part of Edmund Dantes which is the principal role in said play, almost continuously since the year 1883, and has appeared in the said role of

Edmund Dantes in the said play for more than five thousand times, and the said play has always been a great artistic and financial success and is of great value.

X. That the defendant, General Film Company, carries on business and has an office for the transaction of business in the Borough of Manhattan, City of New York, and has distributed and caused to be produced upon the stage, pictures, which are commonly called "motion pictures", representing the different characters in action, so as to 20 tell the story of said play "Monte Cristo," as produced by plaintiff upon the stage. The representation is given upon a stage, and the moving picture shows all the character, scenes and incidents, as are produced by the plaintiff, and tells the story as told by the play owned by plaintiff as aforesaid. That the defendant, for consideration, distributes films among the proprietors of moving picture houses, to give performances and stage representations of the scenes, characters and incidents of said play, advertising and announcing, or causing the advertisement and announcement of this fact, and deriving a large 21 revenue from such productions. That the most of said productions given by persons to whom the defendant distributes and rents the said films, and who are licensed by the defendant to give motion picture productions from the said film, are of a cheap order, in theatres and places of exhibitions, charging not more than from five to twenty-five cents admission, and the defendant has distributed, and is threatening to continue to distribute, films of the said play among the

22 Bill of Complaint

owners of moving picture houses throughout the country, and especially throughout the City, County and State of New York, where motion picture exhibitions of said play are given, and has widely advertised, or caused the advertisements to be issued of their intention to give representations of said play.

23 XI. That the said pictures so distributed by the defendant were made, as plaintiff is informed and believes, by the Selig Polyscope Company; that the plaintiff never gave the said Selig Polyscope Company any right, license, permit or authority to manufacture the said pictures, nor has the plaintiff never give any right, license, consent, authority or permission to the defendant to distribute the said motion pictures among the proprietors of moving picture houses.

24 XII. That the motion picture performances of the said play "Monte Cristo" were given from motion picture films made by the said Selig Polyscope Company, and distributed by the defendant at the Delancey Street Theatre in the City of New York on the 14 day of October, 1912, at the Lincoln Square Theatre in the City of New York, on the 25 day of October, 1912, and at other theatres in the City of New York, and the motion picture performance are identical with the characters, scenes and incidents in the said play owned by the plaintiff as aforesaid.

XIII. That the value of the said manuscript "Monte Cristo", owned by the plaintiff, and the value of the exclusive right to give performances

Bill of Complaint

thereof, so owned and possessed by the plaintiff, consists not only in the right to give dramatic performances of the same, and to license others to give dramatic performances of said play, but also in the right to give exhibitions of the said dramatic compositions in motion picture performances, for exhibition in motion picture theatres and the plaintiff has contracted with the Famous Players Motion Picture Company, manufacturers of motion picture films, for the giving of exhibitions of the said Fechter version of the said play, under the title of "Monte Cristo", in motion picture theatres. 26

XIV. That plaintiff has engaged a company of actors and actresses, who in costume and with the aid of scenery, have given performances of the said play "Monte Cristo", before a high-speed camera, and positive films have been prepared by the said Famous Players Motion Picture Company, under their aforesaid contract with the plaintiff, and the plaintiff intends to cause to be given exhibitions of his said play "Monte Cristo" in motion picture theatres, with the aid of the said positive film, and performances so given by him and his company as aforesaid are to be advertised and announced under the said title of "Monte Cristo." 27

XV. That any infringement or encroachment upon or violation of the said exclusive right of the plaintiff to exhibit and perform the said play "Monte Cristo" in motion picture theatres, will cause the plaintiff irreparable loss and injury, which cannot be estimated or fixed in any action at law, nor can the damages be accurately ascer-

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tained and determined, and the exhibition of the said play of the plaintiff, in motion picture theatres, without his authority or consent, will irreparably injure the plaintiff in his right to produce and represent the said play upon the stage, because if the play is performed in motion picture theatres by persons without the right or authority from the plaintiff, it tends to destroy the exclusive right which he possesses to represent and perform in the said play.

29 XVI. That the only assurance and protection of the plaintiff from such irreparable loss and injury with regard to the premises is the intervention of this court by way of injunction to restrain the defendant from in any manner, distributing among the proprietors of moving picture theatres motion picture films representing, or purporting to represent the characters, scenes and incidents of his said play "Monte Cristo".

Wherefore: The plaintiff demands judgment

30 (1) That the defendant be enjoined from producing, exhibiting or causing to be produced or exhibited, and from distributing for production and exhibition on the stage or in any theatre or place of amusement, any motion picture films containing in whole or in part any of the scenes, incidents, plot or story, or any simulated or colorable imitation or adaptation to the plaintiff's play, dramatization or dramatic composition of "Monte Cristo" under the title of "Monte Cristo", or under any title whatsoever.

(2) That the defendant render a full and true account to the plaintiff of all moneys and profits

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derived by it from, or by reason of any performance given by it, or by any other person, of the said play or dramatic composition "Monte Cristo", and for damages and for such other and further relief as to the court may seem just, together with the costs and disbursements of this action.

DITTENHOEFER, GERBER & JAMES,

Attorneys for Plaintiff,

Office & P. O. Address,

No. 96 Broadway,

Borough of Manhattan,

New York City.

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State of Connecticut, }
County of New London, } ss:

Jams O'Neill, being duly sworn, deposes and says: That he is the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters he believes to be true. 33

JAMES O'NEILL.

Sworn to before me this 15th
day of November, 1912.

James R. May,

Notary Public,

(Notarial seal).

Bill of Complaint

State of Connecticut,
County of New London, } ss:
Court of Common Pleas, }

I, William B. Coit, Assistant Clerk of the Court of Common pleas, within and for said County, said Court being a Court of Record, and keeper of the seal thereof, and of the record of the commissions of Notaries Public for said County, do hereby certify that James R. May, Esq., whose name is subscribed to the annexed instrument in his official capacity was on the 1st day of January, 1911, ever since has been, and now is a Notary Public within and for, and residing in said County duly commissioned and sworn, having full power and authority, by the laws of the State, to take the acknowledgment of deeds, conveyances for lands, tenants and hereditaments, situate in Connecticut, or other instruments to be recorded therein, and certify to the same; also to administer oaths, to take affidavits and depositions out of Court; and to give certificates thereof; that full faith and credit may and ought to be given to his official acts and attestations; that the signature to the instrument hereto annexed, purporting to be his I believe to be his genuine official signature; that I am well acquainted with his handwriting, and that said instrument is executed, acknowledged and duly authenticated according to the laws of this State.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at New London, in said County and State, on this 16th day of November, A. D, 1912.

WILLIAM B. COIT,
Assistant Clerk.

(Seal)

Answer

SUPREME COURT

NEW YORK COUNTY

JAMES O'NEILL,

Plaintiff,

against

GENERAL FILM COMPANY,

Defendant.

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The defendant answering the complaint, through Nathan Burkan, its attorney, alleges on information and belief:

I. It denies each and every allegation in paragraph "I" of the complaint contained, except that it denies any knowledge or information sufficient to form a belief as to the allegation in said paragraph contained that the plaintiff is an actor having been engaged in that business for more than forty years.

II. It denies each and every allegation in paragraph "III" of the complaint contained, except that it denies any knowledge or information sufficient to form a belief as to the allegation that Charles Fechter was in year 1870-1871 employed by one Arthur Cheney as an actor and director of the Globe Theatre in Boston.

III. It denies each and every allegation in paragraph "IV," "VI" and "VIII" of the complaint contained, except that it denies any knowledge or information sufficient to form a belief as to the al-

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legations that the said alleged adaptation or play in said paragraphs referred to was never copyrighted under the law of the United States or of any other country.

IV. It denies each and every allegation in paragraph "V" and "VII."

V. It denies any knowledge or information sufficient to form a belief as to any of the allegations in paragraph "IX" of the complaint contained, except that it denies the allegation that
41 said play "Monte Cristo" was first written by said Charles Fechter and Arthur Leclercq.

VI. It denies each and every allegation in paragraph "X" of the complaint contained, except that it admits that the defendant carries on business and has an office for the transaction of business in the Borough of Manhattan, City of New York.

VII. It denies each and every allegation in paragraph "XI" and "XII" of the complaint contained.

42 VIII. It denies each and every allegation in paragraph "XIII" of the complaint contained, except that it denies any knowledge or information sufficient to form a belief as to the allegation that the plaintiff has contracted with the Famous Motion Picture Company for the giving of exhibitions of said Fechter version of said play referred to in the complaint.

IX. It denies any knowledge or information sufficient to form a belief as to any of the allegations in paragraph "XIV" of the complaint contained.

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X. It denies each and every allegation in paragraph "XV" and "XVI" of the complaint contained.

FOR A FIRST DEFENSE, THE DEFENDANT ALLEGES
UPON INFORMATION AND BELIEF:

XI. That the novel entitled "The Count of Monte Cristo" referred to in the complaint, was written in the French language by Alexander Dumas, the well-known French author, in or about the year 1844, and was first published in or about
44 the year 1845. The said novel has long been in the public domain and public property. That translations of said novel were made into the English and many other languages, and English and other translations of said novel were published and were in the public domain and public property before the year 1870, and other English translations of said novel have been published since 1870, and have long been and were public property prior to the acts of the defendant complained of in the complaint.

XII. That in or about the year 1848, the said
45 Alexander Dumas dramatized his said novel under the title "Monte Cristo" and publicly produced said dramatization upon the stage under said title "Monte Cristo" and published the same under said title prior to the year 1870, and said dramatization was in the public domain and public property prior to the year 1870.

XIII. That since the publication of said novel many dramatizations of the same have been made in the English and other languages, which dram-

atizations have been publicly produced upon the stage under the title "Monte Cristo," and have been published under said title and which long before the alleged acts of the defendant complained of in the complaint fell into the public domain and became and were and are public property, and some of which dramatizations were public property prior to the year 1870.

47 XIV. That the dramatization described in the complaint as the Fechter version of Monte Cristo was not the original work of Charles Fechter and Arthur Leclercq, mentioned in the complaint, and adapted by said Charles Fechter and Arthur Leclercq, nor prepared, arranged or adapted by 48 was not originally created, invented, composed or them from original sources, but said alleged Fechter version was made by copying, paraphrasing and adopting the ideas, characters, dialogues, dramatic incidents, scenery, costumes and atmosphere of the said novel, translations and dramatizations which were in the public domain and said alleged Fechter version was made up of matter 48 contained in said novel, translations and dramatizations which anyone was at liberty to use.

XV. The defendant reiterates and realleges each and every allegation and denial of this answer contained, and makes the same part of this its First Defense.

FOR A SECOND DEFENSE, THIS DEFENDANT ALLEGES
UPON INFORMATION AND BELIEF:

XVI. That the alleged dramatic version of "Monte Cristo" referred to in the complaint as

the Fechter version, was for many years prior to the making of the motion pictures complained of, abandoned and dedicated to the public, and the same now is in the public domain by virtue of the following facts:

(a) That the plaintiff and his alleged predecessors in title of the said alleged version, for the purpose of advertising public performances of said alleged version, printed, published and widely circulated and displayed in show windows, on billboards and other public places in various parts of the United States, theatrical posters and prints depicting all the important scenes and incidents claimed by the plaintiff and his predecessors in title to be peculiar to said version. 50

(b) That for over thirty years, theatrical companies have given public representation of said alleged version without leave, license or permission of the plaintiff and his predecessors in title, and the plaintiff and his predecessors in title with full knowledge of such representations made no protest, but knowingly permitted and acquiesced in said public representations, and that said companies so represented said alleged version, printed published and circulated and displayed in public places in various parts of the United States, theatrical posters and prints depicting all the important scenes and incidents of the said alleged version, without leave or license of the plaintiff and his predecessors in title, and plaintiff and his predecessors, in title made no protest, but knowingly permitted and acquiesced in such acts. 51

(c) That various theatrical companies throughout the United States have for over thirty years

given public performances of various versions of the said novel "Monte Cristo," and for the purpose of advertising said performances have printed, published, circulated, displayed and advertised in various parts of the United States, theatrical posters and prints depicting the principal scenes and incidents of the said alleged version claimed by the plaintiff and his predecessors in title, and the plaintiff and his predecessors in title, knowingly permitted and acquiesced in such printing, publishing and advertising by said theatrical posters.

(d) That for over twenty years lithographing companies engaged in the business of printing theatrical posters have printed, published and displayed, and have sold theatrical posters depicting the principal scenes and incidents peculiar to the plaintiff's alleged version, and distributed the same for theatrical companies engaged in the business of giving public representations of versions of Dumas' novel "Monte Cristo," without the protest of the plaintiff and his predecessors in title, and they knowingly acquiesced in such acts.

54 XVII. The defendant reiterates and realleges each and every allegation and denial of this answer contained, and makes the same part of this its Second Defense.

FOR A THIRD DEFENSE, THIS DEFENDANT ALLEGES:

XVIII. The defendant reiterates and realleges each and every allegation in paragraphs I to XVI of this answer contained and makes the same a part of this, its Third Defence.

XIX. That the defendant has heretofore leased to exhibitors of motion picture films, certain films owned by the Selig Polyscope Company, entitled "Alexander Dumas's masterpiece Monte Cristo, a photo-play in three reels."

That the said "photo-play" so-called, consists entirely of a series of pictures which are shown upon a screen. There are no spoken words and with the exception of a few explanatory words that are thrown upon the preceding screen, or following some of the pictures there is no text whatever.

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That in making these pictures, subjects of a spectacular or sensational character and scenes are selected in which the appearance, position and arrangement of the persons and objects shown indicate without language what transpires.

That the said motion pictures made by said Selig Polyscope Company represent such spectacular and sensational scenes as were described in or suggested by said novel and the translations and dramatizations of the said novel which were at the time of the making of said pictures public property.

That all the matter, scenery, characters, costumes and incidents used in making and represented in said motion pictures were such as were contained or described in said novel, translations, dramatizations, versions, posters, and prints which were and are in the public domain.

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XX. That the general plan of said motion pictures made by said Selig Polyscope Company differs materially from the said alleged Fechter version, and that there are no similarities between said motion pictures and said Fechter version, ex-

Bill of Particulars

NEW YORK SUPREME COURT

NEW YORK COUNTY

JAMES O'NEILL,

Plaintiff,

against

GENERAL FILM COMPANY,

Defendant.

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The following is a Bill of Particulars of plaintiff's claim:

I. Plaintiff claims that the films, which the defendant is distributing, with the following characters have been taken from his play.

(a) The character of Noirtier in all the scenes in which said character appears.

(b) The character of Caderousse, in that Caderousse is represented as the owner of "The Reserve," an honest man and a friend of Dantes.

(c) The character of LaCarconte in that she is represented in Act I of the play and in the pictures as the wife of Caderousse and serves the guests at "The Reserve" and superintends Dantes wedding feast.

(d) The character of Mercedes in that she is represented as having been married to Dantes and being the mother of Albert.

(e) The character of Albert in that he is represented as being the son of Mercedes and Dantes and an officer in the French Army.

Answer

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cepting in respect to such features as were taken from common sources, to wit: from said novel, translations, dramatizations, versions, posters and prints which were in the public domain.

Wherefore, the defendant demands judgment dismissing the complaint with costs.

NATHAN BURKAN,
Attorney for Defendant,
165 Broadway,
New York City.

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State of New York,
City and County of New York. } ss:

Jacques A. Berst, being duly sworn, deposes and says: That he is the President of the plaintiff in the within action; that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. That the reason why this verification is made by deponent and not by plaintiff is that plaintiff is a corporation.

JACQUES A. BERST.

Sworn to before me this
6th day of December, 1912.

V. Bigelow,
Notary Public,
New York County.

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II. Plaintiff claims that in the films which the defendant is distributing the following scenes and incidents are taken from plaintiff's play, a copy of which was heretofore served upon you.

(a) That all the pictures showing scenes and incidents of Morel giving Dantes his captain's papers as a wedding present is taken from Act I Scene I of plaintiff's play.

(b) That all the pictures showing the wedding feast of Dantes and Mercedes have been taken 65 from the play of the plaintiff Act I, Scene III.

(c) That all the pictures showing the visit of Villefort to the Chateau d'If and all the scenes and incidents in connection therewith are taken from Act II, Scene II of plaintiff's play.

(d) That all the pictures showing Abbe Faria giving Dantes a paper stating where the treasure of Monte Cristo is located, and all pictures showing the Abbe Faria giving Dantes a knife with which to cut open the sack and escape are all taken from Act II, Scene II of plaintiff's play.

66 (e) That the words "The World is Mine," which are thrown on the screen, are directly taken from the last line of Act II, Scene III, of plaintiff's play.

(f) That all the pictures showing Dantes standing on a rock in the sea with his arms outstretched are taken from Scene III, of Act II of plaintiff's play.

(g) That all the pictures representing Noirtier making inquiries of Villefort concerning Dantes are taken from Act II, Scene I of plaintiff's play.

excepting that this incident is represented in the play as occurring in the house of Fernand in Paris, and in pictures it is represented as occurring in Villefort's office.

(h) That all pictures showing scenes of the interior ground floor of the Inn of the Pont du Gard, and all characters and incidents in connection with the said scenes are taken from Act III of plaintiff's play.

(i) That all pictures showing scenes of the house of Fernand in Paris, and all characters and incidents in connection with said scene are taken from Act IV of plaintiff's play, except the picture representing Dantes and Haydee entering Fernand's house, and except that the character of Haydee, which appears in the pictures, does not appear in the play.

(j) All pictures showing scenes or incidents occurring in the Forest of Vincennes, including the characters of Edmond, Danglars, Noirtier, Albert, Fernand and Mercedes; the death of Fernand, the duel between Dantes and Danglars, are all taken from Act V of plaintiff's play.

Dated, New York, January 28th, 1913.

DITTENHOEFER, GERBER & JAMES,
Attorneys for Plaintiff.

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State of New York,
City and County of New York. } ss:

James O'Neill, being duly sworn, deposes and says that he is the plaintiff in the above entitled action; that he has read the foregoing Bill of Particulars and knows the contents thereof; that the same is true of his own knowledge, except as to

Judgment at Special Term

the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

JAMES O'NEILL.

Sworn to before me this

28th day of January, 1915.

John B. Knox,

Commissioner of Deeds,

City of New York.

Judgment at Special Term

At a Special Term, Part V of the Supreme Court of the State of New York, held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City of New York, on the 19th day of April, 1915.

Present: HON. CLARENCE SHEARN, Justice.

JAMES O'NEILL,

Plaintiff,

against

GENERAL FILM COMPANY,

Defendants.

This action having been commenced by the service of a summons and complaint on the 18th day of November, 1912, and the defendant having duly appeared by its attorney, Nathan Burkan, and in-

terposed an answer, and the issues so joined having come on to be tried at Special Term, Part V of this Court, and the Court having rendered its decision in favor of the plaintiff, finding among other things that prior to the year 1883, one Charles Fechter, assisted by one Arthur Leclercq, originated, wrote and composed a dramatization, for stage performance, of a certain novel, written by Alexander Dumas, and known as "Count of Monte Cristo," which said dramatization was entitled "Count of Monte Cristo" known as the Fechter version of "Count of Monte Cristo;" that the plaintiff became the owner of the said Fechter version of "Count of Monte Cristo" in June, 1885, and ever since said time has been and still is the owner of the same; that the said Fechter version of "Count of Monte Cristo" has always been kept in manuscript form, and has never been published, or in any manner dedicated to the public; that the defendant, without the consent of the plaintiff, has been exhibiting a certain motion picture film, which was entitled "Count of Monte Cristo;" that the said motion picture film tells the story of the play "Count of Monte Cristo," as told in the said Fechter version, and using the scenes characters and incidents as they are used in the Fechter version of the play "Count of Monte Cristo," which are not found in any other book or play, and which were original with the said Charles Fechter; that the defendant has realized large profits from the production of the said motion picture film, and that the plaintiff was entitled to a judgment, perpetually enjoining and restraining the defendant, its licensees, agents, servants and employees, from producing, exhibiting or causing to

be produced or exhibited, by means of motion pictures, any of the scenes or incidents from the plaintiff's play or dramatization known as Fechter version of "Count of Monte Cristo," or any colorable imitation or adaptation thereof, or from distributing, using or giving away any motion picture film containing any of said scenes or incidents, and that the defendant render a full and true account of all the profits derived by it from the use of the films of said photo-play "Count of Monte Cristo" from license fees or compensation received from renting or loaning the said film for exhibition purposes, and that a referee be appointed to take the account;

Now, on motion of Dittenhoefer, Gerber & James, attorneys for the plaintiff, it is

ORDERED, ADJUDGED AND DECREED: That the defendant, its licensees, agents, servants and employees, and all persons acting by, through or under it, be and they hereby are perpetually enjoined and restrained from producing, exhibiting, or causing to be produced or exhibited, by means of motion pictures or by the aid of motion picture films, in whole or in part, any of the scenes or incidents of the plaintiff's play, dramatization or composition, known as the Fechter version of "Count of Monte Cristo," or any colorable imitation or adaptation thereof, and from distributing using or giving away any motion picture films containing any of the said scenes or incidents; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED: That the defendant render a full and true account and pay to the plaintiff all profits received by it

from the use of the film or any of the films of the said photo-play "Count of Monte Cristo," from license fees, compensation received from renting or loaning said film, for exhibition purposes or otherwise, and from all other sources in connection with the use or exhibition of the said photo-play "Count of Monte Cristo;" and it is

FURTHER ORDERED, ADJUDGED AND DECREED: That Herbert R. Limburg, Esq., counsellor-at-law, be and he hereby is appointed sole referee, to take and state the said account, and that the defendant produce before the said referee all its books and papers, in its possession or under its control, showing the revenues derived and sums of money received by it from any source, from or through the said photo-play "Count of Monte Cristo," and all its dealings and transactions therewith, and that the defendant's officers attend before said referee, and submit to an examination respecting said moneys and profits received and realized by the defendant from and through the use of the said photo-play, and its dealings and transactions therewith; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED: That plaintiff, James O'Neill, have judgment against the defendant, General Film Company, for the amount which may be found to be due to him on the said accounting, and that final judgment be entered accordingly in favor of the plaintiff, James O'Neill, and against the defendant, General Film Company, together with the costs of this action; the propriety of an extra allowance of costs to be determined on the coming in of the report of the said referee.

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And either party may apply for such further order and direction, to be added at the foot hereof, as may be proper or necessary.

CLARENCE J. SHEARN,
J. S. C.

**Findings of Fact and Conclusions of
Law**

83

NEW YORK SUPREME COURT

NEW YORK COUNTY

JAMES O'NEILL,	} Plaintiff,
against	
GENERAL FILM COMPANY,	
	} Defendant.

84 This action having been tried before me, at Special Term, Part V, of this Court, without a Jury, and having heard and considered the proofs and evidence offered by the respective parties, I do make and find the following facts and conclusions of law:

FINDINGS OF FACT

1. That the plaintiff is, and for more than forty years has been, an actor by profession, following, and actively engaged in, his profession.

Findings of Fact and Conclusions of Law 85

2. That in or about the year 1844, one Alexander Dumas originated, wrote, composed and published a novel to which he gave the title "Count of Monte Cristo," which novel was published by him in France and in this country. The said novel was published by the said Dumas in two volumes, consisting of about 600 printed pages in each volume, having about 70 characters, with a very large number of romantic scenes and incidents.

3. That prior to the year 1883, one Charles Fechter (assisted by one Arthur Leclercq) originated, wrote and composed a dramatization for stage performance of the said novel "Count of Monte Cristo," which became known as the Fechter version. 86

4. In preparing the said dramatization, the said Fechter only selected portions of the said novel, which he deemed valuable for his dramatization, disregarding and eliminating over fifty-five of the characters referred to and appearing in the story or novel, and many hundreds of the scenes and incidents therein. That the said Fechter changed the characters reconstructed the scenes, transposed and epitomized some of the incidents found in the novel or story, and created an original work, boiling down his literary creation so as to permit of the performance upon the stage within the limits of two and a half hours, which required ability of a high order as a dramatist and originality and much skill. 87

5. That the said dramatization known as the Fechter version was the only dramatization of the said book or story "Count of Monte Cristo" which has ever been performed with success.

88 Findings of Fact and Conclusions of Law

6. That the said Fechter version of "Count of Monte Cristo" and entitled "Count of Monte Cristo" was kept in manuscript form, and has never, at any time, been published or dedicated to the public.

7. That in and prior to the year 1883, one John Stetson was the owner of a theatre in the City of Boston, known as the Globe Theatre, where the said Charles Fechter had, prior to his death, been employed as the leading actor.

89 8. That in said year, the plaintiff, James O'Neill, was employed as an actor by the said John Stetson, and played the principal character in the said Fechter version of the said play "Count of Monte Cristo," being the character of Edmund Dantes, later known in the play as the Count of Monte Cristo.

9. That in the said year, of 1883, the said John Stetson owned the said Fechter version of the said play, and the manuscript thereof, and was in possession of the original manuscript.

90 10. That subsequently and in June, 1885, the plaintiff purchased, for a valuable consideration, from the said John Stetson, the said play of "Count of Monte Cristo," known, as aforesaid, as the Fechter version, and the said John Stetson delivered to the plaintiff the original manuscript of the said play, which manuscript has ever since been, and is now, in the possession of the plaintiff.

11. That at the time of the purchase of the said play by the plaintiff from the said Stetson, there was delivered to the plaintiff in addition to the

Findings of Fact and Conclusions of Law 91

said original manuscript, a bill of sale or transfer of the title of the said play and manuscript from the said John Stetson to the plaintiff.

12. That since June, 1885, the plaintiff has been in the continuous, uninterrupted, open possession of the said play, and the manuscript thereof, and has performed upon the stage in the various cities of the United States the said play, namely, what is known as the Fechter version of "Count of Monte Cristo" for no less than 5,000 times, acting the principal character of Edmund Dantes, or the Count of Monte Cristo, in the said play, and appearing in the various states of the United States. 92

13. That the plaintiff has become identified with the said play because of his continuous production of the play since 1885, and has made the play famous, and the said play has been the principal and almost sole dramatic production in which the plaintiff has appeared since 1885.

14. That the right and title of the plaintiff in and to said play has never been questioned since he acquired the said play in 1885, and royalties have been received by and paid to the plaintiff 93 from others who have sought and acquired from him a license to give performances thereof, which royalties have continued down to and after the commencement of this action.

15. That the plaintiff has enforced, by suits, his right and claim against persons who undertook to give a performance of the said play without his consent or license, and the Courts have upheld, protected and recognized the plaintiff's right and title to the said play.

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16. That the plaintiff's possession of, and title to, the said play has been open, notorious and continuous, without question or dispute since he acquired the said play in June, 1885.

17. That the said play was never printed and published by the plaintiff or his predecessors in title, and has always remained in manuscript, which manuscript was produced by the plaintiff on the trial of this action.

95 18. That the said play has been a great artistic and financial success, and is of great value to the plaintiff.

96 19. That the defendant, the General Film Company, is a corporation duly organized and existing under the laws of the State of Maine, having an office for the transaction of its business at No. 200 Fifth Avenue, in the Borough of Manhattan, City of New York, and is engaged, among other things, in the business of furnishing films of photo-plays to managers and proprietors of motion picture theatres, to enable them to give public theatrical performances of said photo-plays at the theatres of the licensees of the said General Film Company, receiving therefor compensation and profit.

20. That a motion picture film of a play for the purpose of giving or authorizing the giving of motion picture performances thereof, is prepared by writing a scenario of the play which tells the story of the play, and a company of actors and actresses is employed to give a pantomimic performance of the play in costume and with scenery, before a high-speed or rapid-fire camera. That

Findings of Fact and Conclusions of Law 97

the negative film is thereafter developed, from which positive films are printed and distributed, and with the aid of said film and a projecting machine, the pantomimic performance of the play given before the high-speed camera is reproduced upon a screen. That the reproduction of the pantomimic performance tells the story of the play in proper sequence and order, so that the audience attending a theatre to witness a motion picture exhibition or performance is entertained by seeing a performance of the play, which tells the story of the play in action, and wherever there is any 98 doubt or question as to whether the audience can clearly understand the story that is told by the performers, words are cast upon the screen by means of slides, to explain to the audience the meaning intended to be conveyed by the pantomimic performance, so that the audience attending the exhibition, witness a dramatic performance of the play, telling the story thereof in action, by actors in costume, and with the aid of scenery.

21. That the Selig Polyscope Company, an Illinois corporation, prepared a motion picture 99 film of the play, the "Count of Monte Cristo," using for that purpose the Fechter version of the "Count of Monte Cristo," the play of the plaintiff, and of which the plaintiff was the exclusive owner.

22. That the said photo-play manufactured by the said Selig Polyscope Company tells the story of the "Count of Monte Cristo" as told in the said Fechter version, using scenes, characters and incidents as they are used in the said Fechter ver-

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sion of the "Count of Monte Cristo," and found in no other book or play, and which were original with the said Charles Fechter.

23. That inextricably interwoven into the said photo-play prepared by the said Selig Polyscope Company are the principal and most striking incidents original with the said Charles Fechter, and found only in the said Fechter version of the said play.

101 24. That the person witnessing a performance of the said photo-play prepared by the said Selig Company and familiar with the plaintiff's play, will readily recognize it and the story as told in the plaintiff's production, is told in the said photo-play manufactured by the said Selig Company and in the same order and sequence.

25. That over fifty of the characters omitted from the published novel of the "Count of Monte Cristo" by the said Fechter in preparing his version, are also omitted in the said photo-play prepared by the Selig Company.

102 26. That scenes selected from the said novel by the said Fechter are used in the said photo-play manufactured by the Selig Company in the same way and as used in the Fechter version, and the scenes omitted in the Fechter version are omitted in the photo-play.

27. That words used only in the Fechter version and not found in the book or novel, are flashed upon the screen in connection with the performance of the said photo-play, and are a part of the said film used to give the exhibition, and said words are used by the characters and in connec-

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tion with incidents originated by the said Fechter in his dramatization, and not found in the book or novel, as used in said Fechter version.

28. That the said defendant, prior to the commencement of this action, distributed and caused to be distributed more than forty copies of the said photo-play among the different licensees of the defendant, and caused to be produced upon the stage in various theatres of the City of New York and elsewhere, performances of the said photo-play prepared by the said Selig Company, representing 104 the different characters in action, so as to tell the story of the said play the "Count of Monte Cristo" substantially as produced by the plaintiff upon the stage.

29. That the licensees of the defendant were the owners or proprietors of motion picture theatres at which exhibitions of the said photo-play were given to the public, and the public invited for a small consideration, to witness the said exhibitions of the said photo-play, which said performances and representations were advertised and announced as performances of the play the 105 "Count of Monte Cristo," and under the said title, the "Count of Monte Cristo."

30. That each of the said theatres at which the said performances of the said photo-play were given, was a licensee of the defendant, paying to the defendant a consideration for the license or right to exhibit the said photo-play, and in each and every instance the defendant delivered to its licensee, a positive film of the said photo-play, in order to enable the said performances to be given

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at the said theatres, and without which positive film the performances could not be given.

31. That each of the said theatres licensed to perform the said play by the defendant, had a stage, curtain and scenery, auditorium and balcony and boxes, and the public invited to witness a performance of the play the "Count of Monte Cristo," paying an admission fee varying from 5¢ to 25¢.

107 32. That the defendant intended to continue distributing said films for motion picture exhibitions among its licensees until restrained by an order of this Court in this action.

33. That compensation was received and profit made by the defendant from the parties to whom it leased the said photo-play and the said films, and to whom it authorized and licensed the right to give exhibitions of said play, the "Count of Monte Cristo" with the use of the said films.

108 34. That the said defendant, as well as the Selig Company were duly notified by the plaintiff of his rights and of the claim which he made, and that he objected to the acts of the defendant in giving and authorizing the giving of exhibitions of the said play, the "Count of Monte Cristo" by means of the said films and as photo-plays. That the said defendant continued and disregarded plaintiff's rights, and without his consent gave and authorized the giving of the said exhibitions until restrained by the injunction of this Court in this action.

35. That the said exhibitions which were given by the defendant and by its licensees of the said

Findings of Fact and Conclusions of Law 109

play, were without the consent, license, permission or authority of the plaintiff.

36. That the value of the said manuscript of the "Count of Monte Cristo" owned by the plaintiff, and the value of the exclusive right to give performances thereof, consists, not only of the right to give dramatic performances and license others so to do, but also in the right to give exhibitions of the said dramatic composition by means of motion pictures, and in motion picture theatres.

37. That any infringement or encroachment 110 upon or violation of the exclusive right of the plaintiff to exhibit and perform the said play, and the acts of the defendant in giving and authorizing the giving of performances of the said play by means of motion pictures in motion picture theatres, has caused the plaintiff irreparable loss and injury, which cannot be accurately ascertained or fixed in any action at law, nor can the damages be accurately ascertained and determined. That the exhibition of the said play of the plaintiff in motion picture theatres without his authority or consent, will irreparably injure the plaintiff in his right of property, and in his ex- 111 clusive right to produce and represent the said play upon the stage; that to permit performances of his play in motion picture theatres by persons having no right or authority from the plaintiff so to do, will tend to destroy the exclusive right which the plaintiff possesses to represent and perform, and to authorize others to represent and perform the said play.

38. That the plaintiff has no adequate remedy at law.

CONCLUSIONS OF LAW

1. That the plaintiff is entitled to judgment, perpetually enjoining and restraining the defendant, its licensees, agents, servants, employees and all persons acting under or through it, from producing, exhibiting or causing to be produced or exhibited by means of motion pictures, or with the aid of a motion picture film in whole or in part, any of the scenes or incidents of the plaintiff's play, dramatization or composition, known as the
 113 Fechter version of the "Count of Monte Cristo," or any colorable imitation or adaptation thereof, and from distributing, leasing or giving away any motion picture film containing any of said scenes or incidents.

2. That the defendant render a full and true account, and pay to the plaintiff all profits received or derived by it from the use of the films or any film of the photo-play, the "Count of Monte Cristo," and from license fees, compensation received for renting or loaning the said film for exhibition purposes or otherwise, and from all
 114 other sources in connection with the use or exhibition of the said photo-play, the "Count of Monte Cristo."

3. That a referee be appointed to take the said account, before whom the defendant shall produce its books and papers in its possession or under its control, showing all revenues derived and sums of money received by it from any source from or through the said photo-play, the "Count of Monte Cristo," and all its dealings and transactions therewith, and the defendant and its officers shall

attend before the referee, so to be appointed, to submit to examination respecting the said moneys and profits received and realized by the defendant from or through the use of the said photo-play, and its dealings and transactions therewith.

4. That the plaintiff is entitled to the costs of the action.

5. That an interlocutory judgment should be entered accordingly, and provision made therein for the entry of final judgment on the coming in and confirmation of the report of the Referee, and
 116 reserving the question of extra allowance until the coming in of said report.

April 19, 1915.

CLARENCE J. SHEARN,
 J. S. C.

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**Defendant's Proposed Findings of
Fact and Conclusions of Law**

*(Words inserted by the trial Justice are printed
in italics; words crossed out by trial Justice are
printed with a line through them.)*

NEW YORK SUPREME COURT

NEW YORK COUNTY

119 JAMES O'NEILL,

Plaintiff,

against

GENERAL FILM COMPANY,

Defendant.

The issues herein having come on for trial before me, the undersigned, Justice of this Court, at Special Term, Part V thereof, and having been tried on the 15th and 16th days of March, 1915, now, upon consideration of the proofs and allegations of the respective parties and of the arguments of counsel, I do hereby decide and find as follows:

FINDINGS OF FACT

I. That the plaintiff is an actor by profession, having been engaged in that business for more than forty years. *See Plaintiff's Finding of Fact No. 1.*

II. That the plaintiff has publicly appeared over five thousand times in a play under the title

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"Monte Cristo," arranged and adapted from the novel by Alexander Dumas, "The Count of Monte Cristo." That said play has been marked in evidence, Plaintiff's Exhibit A. *See Plaintiff's Finding of Fact No. 12.*

III. That on or about June 15th, 1885, the plaintiff purchased from one John Stetson, all his right, title and interest in and to the said play known as "Monte Cristo," Plaintiff's Exhibit A. *See Plaintiff's Finding of Fact No. 10.*

IV. That Charles Fechter gave public performances of the said drama, Plaintiff's Exhibit A, from 1873 to the time of his death in 1879. That during all of said times he had in his possession a copy of the said drama "Monte Cristo," Plaintiff's Exhibit A. 122

Found, C. J. S.

V. That in 1883 an action was brought by the widow of Charles Fechter against John Stetson for an injunction to restrain said Stetson from producing the said play, Plaintiff's Exhibit A, upon the ground that she was the owner of the performing rights of said play as heir of said Charles Fechter and that said suit was terminated by her death. 123

Found, C. J. S.

VI. That the plaintiff and his assignor, John Stetson, for the purpose of advertising public performances of said play "Monte Cristo," Plaintiff's Exhibit A, printed, published and widely circulated and displayed in show windows, on bill boards and other public places in various parts of the United States, theatrical posters and prints

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depicting ~~all~~ many of the important scenes and incidents portrayed in said play, Plaintiff's Exhibit A.

Found as modified, C. J. S.

VII. That for the purpose of making said pictorial posters and prints flashlight photographs were taken of said scenes and incidents as represented by the plaintiff upon the stage from the said play, Plaintiff's Exhibit A, and said pictorial posters were reproduced from said
125 flashlight photographs.

Found, C. J. S.

That some of said flashlight photographs have been marked in evidence Defendant's Exhibits 11, 12, 13, 14, 15, 16, 17, 18 and 19.

Found, C. J. S.

That copies of said posters have been marked in evidence, Defendant's Exhibits 9 and 10.

VIII. That before the 1st day of November, 1912, the plaintiff made a contract with the Famous Players' Motion Picture Company for the making of a motion picture film adapted to reproduce in motion pictures the said drama "Monte
126 Cristo," Plaintiff's Exhibit A.

Found, C. J. S.

IX. That for the purpose of making the said pictures the plaintiff engaged a company of actors and actresses, who, in costume and with the aid of scenery, gave performances of the said play "Monte Cristo," Plaintiff's Exhibit A, before a high speed camera, and positive films have been prepared by the Famous Players Motion Picture Company, with the consent of the plaintiff, and

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the plaintiff caused to be given through the said Famous Players Motion Picture Company exhibitions of the said film "Monte Cristo" in motion picture theatres with the aid of said positive film, and exhibitions so given by him and his company were advertised and announced under the said title of "Monte Cristo." That one of said advertisements was admitted in evidence, marked Defendant's Exhibit I.

Found, C. J. S.

X. That the plaintiff for the purpose of enabling the said Famous Players Motion Picture Company to make the said films and to give the said performances delivered the said play, Plaintiff's Exhibit A, to the stage director of the said Famous Players Film Company. That the plaintiff assisted in the making of the said films.
128

Found, C. J. S.

XI. That the said film adapted to reproduce in motion pictures said play, Plaintiff's Exhibit A, was released for distribution and circulation among exhibitors and motion picture theatres on the 1st day of November, 1912.

Found, C. J. S.

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XII. That with the consent of the plaintiff the said Famous Players Motion Picture Company secured copyright in said films by publishing copies of said film adapted to reproduce in motion pictures said play, Plaintiff's Exhibit A on the 10th day of December, 1912.

Found, C. J. S.

That the certificate of copyright for said films issued by the Register of Copyrights is marked in evidence Defendant's Exhibit 2.

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XIII. That to secure copyright in said motion picture photoplay a description of said motion picture photoplay was filed in the office of the Register of Copyrights on the 16th day of December, 1912, and a certified copy thereof was marked in evidence, Defendant's Exhibit 4.

Found, C. J. S.

131 XIV. That the novel entitled "The Count of Monte Cristo," was written in the French language by Alexander Dumas, the well-known French author, in or about the year 1844, and was first published in or about the year 1845. That said novel has long been in the public domain and public property. That translations of said novel were made into the English and many other languages, and English and other translations of said novel were published and were in the public domain and public property before the year 1870, and other English translations of said novel have been published since 1870, and have long been and were public property prior to the acts of the defendant complained of in the complaint. That a copy of the said novel is marked in evidence Plaintiff's Exhibit D.

Found, C. J. S.

XV. That in or about the year 1848, the said Alexander Dumas dramatized his said novel under the title "Monte Cristo" in the French language, and published the same under said title prior to the year 1870, and said dramatization was in the public domain and public property prior to the year 1870. That said dramatization has been marked in evidence Defendant's Exhibit 6. That a true translation of said dramatization

Deft.'s Findings of Fact and Conclusions of Law 133

has been marked in evidence, Defendant's Exhibit 7.

Found, C. J. S.

XVI. That on the 17th day of October, 1868, one Benjamin Webster, the manager of the Adelphi Theatre, Strand, London, deposited in the Lord Chamberlain's Office, one of the Departments of the King's Household of the United Kingdom of Great Britain and Ireland, a drama or play printed in book form, under the title "Monte Cristo" for the purpose of securing a license to publicly represent the said drama at the said Adelphi Theatre, Strand, London, in pursuance to 6 & 7 Vict. c., 68. That the Lord Chamberlain duly placed on file in his office the said drama "Monte Cristo" and issued to said Benjamin Webster a license authorizing him to give on the 19th day of October, 1868, a public representation of said drama at the Adelphi Theatre, Strand, London, England.

Found, C. J. S.

XVII. That the said drama "Monte Cristo" was publicly performed at the Adelphi Theatre, Strand, on the 19th day of October, 1868, in the City of London. That a true copy of said drama has been marked in evidence, Defendant's Exhibit 20.

Found, C. J. S.

XVIII. That under the British Statutes then in existence the public performance of the said drama on the 19th day of October, 1868, constituted in Great Britain a publication thereof, and the author upon having complied with the provisions of the copyright, secured statutory perform-

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ing right in the said drama during the natural life of its author and for the further term of seven years, commencing at the time of his death, or in case said seven years expired before the end of 42 years from said performance, then for the term of 42 years from said performance.

Found as modified, C. J. S.

XIX. That the dramatic version of "Monte Cristo," Defendant's Exhibit 20, differs materially from the dramatic version of "Monte Cristo," Plaintiff's Exhibit A.

137 *Refused, C. J. S.*

XX. That the said version, Defendant's Exhibit 20, is now and has since before the commission of the acts complained of in the complaint been in the public domain.

Refused, C. J. S.

XXI. That the version of "Monte Cristo," Defendant's Exhibit 20, contains all the features of the defendant's motion pictures complained of in the complaint, and in the plaintiff's bill of particulars.

138 *Found, C. J. S.*

XXII. That the plaintiff [never acquired] or had possession of the version of "Monte Cristo," filed in the Lord Chamberlain's Office in 1868, Defendant's Exhibit 20.

Found as modified, C. J. S.

XXIII. That the plaintiff does not own the exclusive right to publicly perform any characters, scenes, incidents or features contained in said version, Defendant's Exhibit 20.

Refused, C. J. S.

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XXIV. That prior to the year 1870, a dramatization of said novel "Monte Cristo" was made and published by one Thomas H. Lacy and was called "Lacy's Acting Edition," which version was republished by Samuel French under the title: "French's Acting Edition (late Lacy's)." That since prior to 1870 said edition has been in the public domain. That a copy of said edition was admitted in evidence, marked Defendant's Exhibit 5.

Found, C. J. S.

XXV. That the defendant General Film Company is a corporation duly organized and existing under the laws of the State of Maine, having an office for the transaction of business, in the Borough of Manhattan, City of New York, and is engaged, among other things, in the business of renting and distributing films for motion pictures, and among other motion picture films it had and distributed on the 18th of January, 1913, and for some time prior thereto, a motion picture film entitled "Monte Cristo."

Found, C. J. S.

XXVI. That the defendant has heretofore, and prior to the 21st of January, 1913, leased to exhibitors of motion picture films, certain films owned by the Selig Polyscope Company, entitled "Alexander Dumas' masterpiece Monte Cristo, a photo-play in three reels."

That the said "Photo-play" so-called, consists entirely of a series of *motion* pictures which are shown upon a screen with brief explanatory announcements preceding certain pictures.

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That in making these pictures, subjects of a spectacular or sensational character and scenes are selected in which the appearance, position and arrangement of the persons and objects shown indicate without language what transpires.

Found as modified, C. J. S.

XXVII. That the said motion pictures made by said Selig Polyscope Company represent such spectacular and sensational scenes as were described in or suggested by said novel and the said dramatizations of the said novel which were at the time of the making of said pictures public property.

Refused, C. J. S.

XXVIII. That all the matter, scenery, characters, costumes and incidents used in making and represented in defendant's said motion pictures and all features of said pictures complained of in the complaint and in plaintiff's bill of particulars, were such as were contained or described in said novel, dramatizations and versions, which were and are in the public domain.

Refused, C. J. S.

XXIX. That the general plan of said motion pictures made by said Selig Polyscope Company differs materially from the play, Plaintiff's Exhibit A, and that there are no similarities between said motion pictures and said play, Plaintiff's Exhibit A, excepting in respect to such features as were taken from common sources, to wit: from said novel, dramatizations and versions that were in the public domain.

Refused, C. J. S.

Deft.'s Findings of Fact and Conclusions of Law 145

XXX. There is no evidence that Charles Fechter and Arthur Leclercq, or either of them, adapted or arranged for Arthur Cheney the drama "Monte Cristo," Plaintiff's Exhibit A.

Refused, C. J. S.

XXXI. That the manuscript Exhibit A is typewritten and was not written by Charles Fechter or Arthur Leclercq.

Found, C. J. S.

XXXII. That the manuscript Exhibit A contains on its title page the statement: "Now the property of John Stetson," and was not made until after the 31st day of August, 1877.

Found, C. J. S.

XXXIII. That there is no evidence that the play Exhibit A was sold or assigned by Charles Fechter and Arthur Leclercq, or either of them to Arthur Cheney.

Refused, C. J. S.

XXXIV. That there is no evidence that Arthur Cheney acquired said play Exhibit A from Charles Fechter and Arthur Leclercq, or from either of them, or from any other person.

Refused, C. J. S.

XXXV. That there is no evidence that John Stetson acquired said play Exhibit A from Arthur Cheney or from any other person.

Refused, C. J. S.

XXXVI. That there is no evidence that John Stetson had exclusive possession of said play Exhibit A, or of the dramatic rights therein.

Refused, C. J. S.

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XXXVII. That there is no evidence that the plaintiff had exclusive possession of the said play, Exhibit A or the dramatic rights therein.

Refused, C. J. S.

XXXVIII. That there is no evidence that Arthur Cheney owned the exclusive right to publicly perform said play, Exhibit A.

Found, C. J. S.

149 XXXIX. That there is no evidence that John Stetson owned the exclusive right to publicly perform said play Exhibit A.

Refused, C. J. S.

XL. That there is no evidence that the plaintiff acquired or owns the exclusive right to publicly perform said play Exhibit A.

Refused, C. J. S.

CONCLUSIONS OF LAW

I. The plaintiff is not and was not at the time of the commission of the acts complained of in the complaint, the exclusive owner of the drama 150 "Monte Cristo," marked Plaintiff's Exhibit A.

Refused, C. J. S.

II. That the plaintiff is not and was not at the time of the commission of the acts complained of in the complaint, the exclusive owner of the performing rights of the drama "Monte Cristo," marked Plaintiff's Exhibit A.

Refused, C. J. S.

III. That the plaintiff is not and never was the owner of the drama "Monte Cristo" marked Defendant's Exhibit 20.

Refused, C. J. S.

Deft.'s Findings of Fact and Conclusions of Law 151

IV. That the plaintiff is not and never was the owner of the exclusive performing rights of the drama "Monte Cristo," marked Defendant's Exhibit 20.

Refused, C. J. S.

V. That the drama "Monte Cristo," marked Defendant's Exhibit 20, was prior to the commission of the acts complained of in the complaint in the public domain.

Refused, C. J. S.

VI. That whatever common law rights the 152 plaintiff had in the drama, Plaintiff's Exhibit A, were lost by the securing of the statutory copyright by the Famous Players Film Company in the photoplay known as "Monte Cristo," with the plaintiff's consent.

Refused, C. J. S.

VII. That this Court has no jurisdiction of the cause of action alleged in the complaint because of the securing of copyright by the Famous Players Film Company with the consent of the plaintiff in the photoplay "Monte Cristo."

Refused, C. J. S.

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VIII. That the display in public places of the pictorial posters and prints depicting the principal scenes and incidents in the drama, Plaintiff's Exhibit A, constituted a publication thereof and a dedication to the public of the scenes and incidents so depicted.

Refused, C. J. S.

IX. That the plaintiff failed to establish any cause of action against the defendant.

Refused, C. J. S.

Defendant's Exceptions

X. That the defendant is entitled to judgment dismissing the complaint on the merits.

And I hereby direct that judgment be entered in favor of the defendant, dismissing the complaint and awarding costs to the defendant to be taxed.

Refused, C. J. S.

Defendant's Exceptions

NEW YORK SUPREME COURT

NEW YORK COUNTY

JAMES O'NEILL,

Plaintiff,

against

GENERAL FILM COMPANY,

Defendant.

The defendant hereby gives notice that it excepts to the rulings of the Court herein upon the findings of fact and conclusions of law as follows:

1. To the finding of fact numbered "3" and each and every part thereof, upon the ground that there is no evidence to support it.

2. To the finding of fact numbered "4" and each and every part thereof, upon the ground that there is no evidence to support it.

3. To the finding of fact numbered "5" and each and every part thereof, upon the ground that there is no evidence to support it.

Defendant's Exceptions

4. To the finding of fact numbered "6" and each and every part thereof, upon the ground that there is no evidence to support it.

5. To that part of the finding of fact numbered "7" which reads as follows:

"where the said Charles Fetcher had, prior to his death, been employed as the leading actor"

and the defendant excepts to the above part of said finding of fact numbered "7" upon the ground that there is no evidence to support it.

6. To the finding of fact numbered "9" and each and every part thereof, upon the ground that there is no evidence to support it.

7. To the finding of fact numbered "10" and each and every part thereof, upon the ground that there is no evidence to support it.

8. To the finding of fact numbered "11" and each and every part thereof upon the ground that there is no evidence to support it.

9. To that part of the finding of fact numbered "12" which reads as follows:

"That since June 1885, the plaintiff has been in continuous, uninterrupted, open possession of the said play and the manuscript thereof"

and the defendant excepts to the above part of said finding of fact numbered "12" upon the ground that there is no evidence to support it.

10. To that part of the finding of fact numbered "14" which reads as follows:

Defendant's Exceptions

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"That the right and title of the plaintiff in and to said play has never been questioned since he acquired the said play in 1885."

and the defendant excepts to the said finding of fact numbered "14" upon the ground that there is no evidence to support it.

11. To the finding of fact numbered "15" and to each and every part thereof, upon the ground that there is no evidence to support it.

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12. To the finding of fact numbered "16" and to each and every part thereof, upon the ground that there is no evidence to support it.

13. To the finding of fact numbered "17" and to each and every part thereof, upon the ground that there is no evidence to support it.

14. To so much of the finding of fact numbered "19" as finds that the defendant receives from the proprietors of motion picture theatres to whom it furnishes films of photoplays profit in addition to compensation, on the ground that there is no evidence to support it.

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15. To the finding of fact numbered "20" and to each and every part thereof, upon the ground that there is no evidence to support it.

16. To the finding of fact numbered "21" and to each and every part thereof, upon the ground that there is no evidence to support it.

17. To the finding of fact numbered "22" and to each and every part thereof, upon the ground that there is no evidence to support it.

Defendant's Exceptions

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18. To the finding of fact numbered "23" and to each and every part thereof, upon the ground that there is no evidence to support it.

19. To the finding of fact numbered "24" and to each and every part thereof, upon the ground that there is no evidence to support it.

20. To the finding of fact numbered "25" and to each and every part thereof, upon the ground that there is no evidence to support it.

21. To the finding of fact numbered "26" and to each and every part thereof, upon the ground that there is no evidence to support it. 164

22. To the finding of fact numbered "27" and to each and every part thereof, upon the ground that there is no evidence to support it.

23. To the finding of fact numbered "28" and to each and every part thereof, upon the ground that there is no evidence to support it.

24. To the finding of fact numbered "29" and to each and every part thereof, upon the ground that there is no evidence to support it. 165

25. To the finding of fact numbered "30" and to each and every part thereof, upon the ground that there is no evidence to support it.

26. To the finding of fact numbered "31" and to each and every part thereof, upon the ground that there is no evidence to support it.

27. To the finding of fact numbered "32" and to each and every part thereof, upon the ground that there is no evidence to support it.

Defendant's Exceptions

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28. To the finding of fact numbered "33" and to each and every part thereof, upon the ground that there is no evidence to support it.

29. To the finding of fact numbered "34" and to each and every part thereof, upon the ground that there is no evidence to support it.

30. To the finding of fact numbered "35" and to each and every part thereof, upon the ground that there is no evidence to support it.

167 31. To the finding of fact numbered "36" and to each and every part thereof, upon the ground that there is no evidence to support it.

32. To the finding of fact numbered "37" and to each and every part thereof, upon the ground that there is no evidence to support it.

33. To the finding of fact numbered "38" and to each and every part thereof, upon the ground that there is no evidence to support it.

34. To the conclusion of law numbered "1."

35. To the conclusion of law numbered "2."

168 36. To the conclusion of law numbered "3."

37. To the conclusion of law numbered "4."

38. To the conclusion of law numbered "5."

The defendant also excepts to the refusal of the Court to find as requested in the proposed findings of fact and conclusions of law proposed by the defendant and filed in the office of the Clerk of the County of New York on the 26th day of April, 1915.

Defendant's Exceptions

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39. To the modification of the defendant's proposed finding of fact numbered "VI," and to the refusal of the Court to find as requested in said proposed finding of fact numbered "VI."

40. To the modification of the defendant's proposed finding of fact numbered "XVIII," and to the refusal of the Court to find as requested in said proposed finding of fact numbered "XVIII."

41. To the refusal to find as requested in the defendant's proposed finding of fact numbered "XIX."

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42. To the refusal to find as requested in the defendant's proposed finding of fact numbered "XX."

43. To the modification of the defendant's proposed finding of fact numbered "XXII," and to the refusal of the Court to find as requested in said proposed finding of fact numbered "XXII."

44. To the refusal to find as requested in the defendant's proposed finding of fact numbered "XXIII."

45. To the modification of the defendant's proposed finding of fact numbered "XXVI," and to the refusal of the Court to find as requested in said finding of fact numbered "XXVI."

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46. To the refusal to find as requested in the defendant's proposed finding of fact numbered "XXVII."

47. To the refusal to find as requested in the defendant's proposed finding of fact numbered "XXVIII."

Defendant's Exceptions

48. To the refusal to find as requested in the defendant's proposed finding of fact numbered "XXIX."

49. To the refusal to find as requested in the defendant's proposed finding of fact numbered "XXX."

50. To the refusal to find as requested in the defendant's proposed finding of fact numbered "XXXIII."

173 51. To the refusal to find as requested in the defendant's proposed finding of fact numbered "XXXIV."

52. To the refusal to find as requested in defendant's proposed finding of fact numbered "XXXV."

53. To the refusal to find as requested in defendant's proposed finding of fact numbered "XXXVI."

174 54. To the refusal to find as requested in defendant's proposed finding of fact numbered "XXXVII."

55. To the refusal to find as requested in defendant's proposed finding of fact numbered "XXXIX."

56. To the refusal to find as requested in defendant's proposed finding of fact numbered "XL."

57. To the refusal to find as a conclusion of law the defendant's proposed conclusion of law numbered "I."

58. To the refusal to find as a conclusion of law the defendant's proposed conclusion of law numbered "II."

Defendant's Exceptions

59. To the refusal to find as a conclusion of law the defendant's proposed conclusion of law numbered "III."

60. To the refusal to find as a conclusion of law the defendant's proposed conclusion of law numbered "IV."

61. To the refusal to find as a conclusion of law the defendant's proposed conclusion of law numbered "V."

62. To the refusal to find as a conclusion of law the defendant's proposed conclusion of law numbered "VI." 176

63. To the refusal to find as a conclusion of law the defendant's proposed conclusion of law numbered "VII."

64. To the refusal to find as a conclusion of law the defendant's proposed conclusion of law numbered "VIII."

65. To the refusal to find as a conclusion of law the defendant's proposed conclusion of law numbered "IX." 177

66. To the refusal to find as a conclusion of law the defendant's proposed conclusion of law numbered "X."

Dated, New York, May 4, 1915.

NATHAN BURKAN,
Attorney for Defendant,
165 Broadway,
Borough of Manhattan,
New York City.

To:

The Clerk of the County of New York.
Dittenhoefer, Gerber & James, Esqs.,
Attorneys for Plaintiff,
96 Broadway,
New York City.

Case

NEW YORK SUPREME COURT

SPECIAL TERM, PART V

JAMES O'NEILL,

Plaintiff,

vs.

GENERAL FILM COMPANY,

Defendant.

Tried March 15th, 1915.

Before The HON. CLARENCE J. SHEARN, J., Sitting
in Equity.

Appearances:

For the plaintiff: Messrs. Dittenhoefer, Gerber
& James.

Mr. David Gerber, Esq., of counsel.

For the defendant: Nathan Burkan, Esq.

JAMES O'NEILL, the plaintiff, called as a witness in his own behalf, being duly sworn, testified as follows:

In answer to Mr. Gerber—Direct-examination:

Q. You are the plaintiff in this action? A. I am.

Q. If you do not object, let me ask you how old are you? A. I am 67 years old.

Q. You have been an actor for how many years? A. Forty-seven years.

Q. Where did you play in 1883? A. In the latter part of 1883 I played at Booth's Theatre, New York. 182

Q. Did you play at the Globe Theatre at any time in Boston? A. The year after this.

Q. And in 1883 at Booth's Theatre, New York, what did you play in? A. Alexander Dumas' masterpiece The Count of Monte Cristo.

Q. Who was your manager at that time? A. Mr. John Stetson.

Q. Did you at that time play in what has been familiarly termed Fechter's version of that play? A. Always called the Fechter version. 183

Q. Tell me who was Mr. Fechter? A. Mr. Fechter was a French actor, who studied English, and came over to this country, recommended by Charles Dickens as one of the greatest actors that Mr. Dickens had ever seen; especially in the romantic parts.

Q. Was he at any time, and if so, when, in the Company of John Stetson, at the Globe Theatre, Boston? A. No, not with John Stetson.

Q. With Arthur Cheney? A. With Arthur Cheney; he was one of the proprietors of the Globe Theatre in Boston at that time.

Mr. Burkan: At this point, knowing the question of fact I won't object to that.

Q. Now, tell me if you know what principal characters that a man named Benjamin Webster played in?

Mr. Burkan: I object as incompetent, immaterial and irrelevant.

Objection overruled and exception.

A. Benjamin Webster became famous in four different plays. One was Robert Beaucaire, the other was Oliver Twist, in which he played Fagin; 185 the other was the Dead Heart, in which he played the principal role of Village.

Q. What was the fourth? A. Then Don Caesar de Bazan. He made a great reputation in all those parts in London.

Q. And he played the role of Noirtiers in the Fechter version, that Fechter wrote of the Count of Monte Cristo? A. It was written for Benjamin Webster.

Q. You are familiar of course with these different characters, of the four plays you have mentioned? A. I have played nearly all of them myself.

186 Q. And of course you are familiar with the character of Noirtiers in the Count of Monte Cristo? A. Very well.

Q. Does the character of Noirtiers in the Fechter version embody the characteristics of the four parts that you have mentioned in those four plays that Webster played in? A. There is a scene representing each one of those plays, taken from those plays, put into the character of Noirtiers in Mr. Charles Fechter's play.

Q. Did you prior to 1884 play under the man-

agement of John Stetson in the play the Count of Monte Cristo? A. I began with him in 1883.

Q. And you played during the 1883 and 1884 theatrical season? A. Yes, sir, under Mr. Stetson's management.

Q. Now, when if at all did you acquire the play the Count of Monte Cristo, the Fechter version? A. Eighteen hundred and eighty-five.

Q. From whom? A. From John Stetson.

Q. How much did you pay for it?

Mr. Burkan: If there is a writing, the writing is the best evidence. 188

Mr. Gerber: I am going to prove the loss of the writing.

A. Two thousand dollars.

Q. Is John Stetson alive? A. No, sir.

Q. When did he die? A. I think about eight years ago.

Q. At the time that you purchased this play from John Stetson did he give you a manuscript of the play? A. Yes, sir.

Q. And I ask you whether at the time of the purchase of this from John Stetson he handed you the manuscript that I now hand you?

Mr. Burkan: That is several questions 189 in one. As I understand that question I object.

The Court: Mark the book for identification, and show him the book and ask if that is the manuscript that he received from Mr. Stetson.

Manuscript marked Exhibit A for identification.

Q. At the time of the purchase from John Stetson and the payment of the money, the \$2000, did

you receive the manuscript marked Exhibit A for identification? (Paper shown witness.) A. This is the manuscript, yes, sir, that I received from Mr. Stetson.

Q. How about the cover; was that cover in the same form? A. No, sir.

Q. The outside cover? A. No, sir; the old cover became so worn and so used that I had to have it re-covered.

Mr. Gerber: I offer in evidence this manuscript, other than the outside cover.

191 Mr. Burkan: I object. I consent to the introduction of the manuscript with the exception of the first page, the title page, on the ground that it is a self-serving declaration, and hearsay, and not binding on the defendant.

The Court: Is the manuscript in the same condition that it was when it was handed to you?

Q. Is the manuscript in the same condition that it was when it was handed to you? A. All except the cover. There may be a few slight cuts, and that is in the dialogue, but very few.

192 Q. That was for the acting part, a change in the dialogue? A. Yes, sir.

Q. Other than the black cover it is in the same condition it was when delivered to you? A. This is the manuscript as delivered to me.

The Court: I will receive it in evidence.

Mr. Burkan: I object to it on the ground the title page is a self-serving declaration, and not binding on the defendant, and is incompetent.

The Court: If there is anything self-

serving in it, I will pass upon the probative value of it later.

Exception taken by Mr. Burkan.

Marked Exhibit A in evidence.

Q. Has Exhibit A been in your possession ever since your purchase in 1885? A. Yes, sir.

Q. Now did you receive any writing from Mr. John Stetson at the time that you made this purchase? A. A bill of sale, yes, sir.

Q. Where was that bill of sale prepared? A. In Mr. Stetson's office at the Globe Theatre in Boston.

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Q. And was it in your presence, prepared in your presence? A. Well, he called in his secretary, Mr. Wellman in, and said "Make out a bill of sale to Mr. James O'Neill for all my right, title and interest in my play of Charles Fechter's version of Count of Monte Cristo."

Q. That was signed and given to you? A. No. The secretary went out to an adjoining room and brought it in. And he read it, and Mr. Stetson signed it.

Q. And gave it to you? A. Yes, sir.

Q. What became of that paper? A. It was sent to Mr. Charles Patty in Boston, who was defend- 195
ing my case against—

Mr. Burkan: I object to that.

Mr. Gerber: It is only for the purpose of showing the loss of the paper, and has no probative force except to prove the loss of the paper. It is secondary evidence only to prove the loss of the paper.

Mr. Burkan: I object as incompetent, immaterial and irrelevant and not binding on the defendant.

(Witness continues.) It was sent to Mr. Charles Patty in Boston.

The Court: Who was Charles Patty?

The Witness: He was my lawyer in Eugene Tompkins case.

Q. Eugene Tompkins was the manager in Boston? A. One of the managers of the Boston Theatre.

Q. A member of the firm of Gilmore & Tompkins? A. No, sir; not at that time; Mr. Gilmore was in this city.

197 Q. You had occasion to commence a suit in Boston? A. Against Alexander Salvini.

Q. Sent on to him in connection with some lawsuit? A. Yes, sir.

Q. Where was that that you saw that paper afterwards? A. I have never seen it since.

Q. Is this attorney alive? A. Dead about six or seven years ago.

Q. What effort did you make to get that paper?

A. After his death I met a Mr. Carrington, I think was his name, who was in Mr. Patty's office. I

198 asked him if he knew where those papers were. He said he thought he could lay his hands on them. I begged him to do so and send them to me. He

left my address, and he promised to do so. He

was an elderly man, a major in the army, and he was showing declining years at that time.

Q. And after that, what effort did you make?

Did you go back to Boston? A. I engaged a lawyer

to go with me in Boston and search up all the law

records, and we finally located a lawyer who had

settled Charles Patty's estate. We had an interview with him, and he said the papers—he said Mr. Patty had left his papers in such a mess that it

was almost impossible to find any particular thing. So in order to hasten the settlement of his estate they simply took all the papers that did not relate to his estate and put them in the waste basket, or he said a drygoods box that they had brought up into the office for that purpose.

Q. What effort did you make to get at that drygoods box? A. He said in moving that that box had been placed in the cellar or basement of the building, and we asked him how we could trace it, and he suggested somebody that he would send to look for it, and did call a man in, to go down- 200 stairs in the basement, and find out what became of that box. The man came back and said that the present janitor down there, the man who has charge of the basement, does not know exactly what became of it; but it has disappeared; evidently thrown out as waste paper.

Q. Have you been able to trace it after that? A. No, sir.

Q. How much time did you spend in Boston just tracing this particular paper? A. Well, I should say at least ten days.

Q. Were you doing nothing but trying to get this paper? A. I was playing there at the time, and I had the days to myself with the exception of two matinees. 201

Q. Now, you may tell what that paper contained?

Mr. Burkan: I object to it on the ground it is incompetent, immaterial and irrelevant, and not binding on the defendant.

The Court: Do you wish to cross-examine on the search?

Mr. Burkan: No, your Honor.

Objection overruled and exception.

A. It was simply a bill of sale made out on an ordinary business sheet of paper with the headlines of the Globe Theatre. It was not quite as long as a foolscap, but very near.

Q. Stating what? A. As near as I can remember it; "To whom it may concern: I have this day for value received sold all my right, title and interest in my play of Monte Cristo purchased by me from Mr. Arthur Cheney of James S. O'Neill, to be his property and his heirs' for all time;" words to that effect. I cannot recall them exactly.

203 Q. That is the substance of it? A. That is the substance of it.

Q. Now Fechter is dead, isn't he? A. Oh he has died years and years ago.

Q. Cheney is dead? A. You know Mr. Fechter was dead four or five years before I played the play.

Q. He died before 1883? A. Yes, sir.

Q. Cheney is dead? A. He died shortly after Mr. Stetson bought the theatre from him.

Q. And you have told us of the death of Mr. Stetson? A. Yes, sir.

204 Q. Now, has this manuscript ever been printed with your consent since you had it? A. No, sir.

Q. It has always remained in this form, this manuscript form? A. Yes, sir.

Q. Now you may tell us about approximately how many times you played the part of Edmond Dantes? I am now referring to the Fechter version of Monte Cristo? A. Over 5000 times.

Q. What part did you play, Edmond Dantes? A. Edmond Dantes, afterwards the Count of Monte Cristo.

Q. Have you ever commenced suit against

people who have violated your rights to the Monte Cristo?

Mr. Burkan: I object to it as incompetent, immaterial and irrelevant, and not binding on this defendant. Also the judgments in these cases will be the best evidence.

The Court: He may have to lumber up the record to show that he has not acquiesced, and that he has from time to time brought suits.

Mr. Burkan: I except.

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Q. Have you from time to time brought suits against people that you claimed had violated your rights? A. Yes, sir.

Q. You commenced suit against a man named Studley in Brooklyn? A. Mr. Stetson—I was simply a member of Mr. Stetson's company at that time.

Q. That was before you acquired the play? A. Yes, sir.

Q. Subsequently you commenced action against whom, in respect of this play? A. I brought suit in Milwaukee against Jacob Litz; brought suit against Mr. Considine, Portland, Oregon; I brought suit against Mr. Fox.

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Q. William Fox? A. William Fox.

Q. Did you ever acquiesce or consent to the productions given of the Count of Monte Cristo, the Fechter version, since you owned it, from 1885?

Mr. Burkan: I object to that as incompetent, immaterial and irrelevant.

Q. By people who had not paid you royalties?

The Court: He may ask whether he has ever consented.

Q. Have you ever consented to the production by people of this version, by anybody? A. No, sir.

Q. Who had not obtained your permission by the payment of royalty? A. No, sir.

Q. Have you ever knowingly consented? A. Never.

Mr. Burkan: I object to all this as incompetent, immaterial and irrelevant, and as not binding on the defendant.

Objection overruled and exception.

Mr. Gerber: Now, in this connection before I ask him further, I offer in evidence, to make it more logical and chronological, a stipulation that was signed by the defendant's attorney after we obtained an order to examine the defendant before trial. The date of the stipulation is March 5, 1915. I ought to state in that connection that the real date was sometime in 1913, the date we took the examination, and that later the original stipulation was signed, and my friend has been kind enough to sign a duplicate for me with the other date, taking the place of the 1913, because the stipulation when I read it to you will show you that.

Received and marked Exhibit B and read to the Court.

Q. Now, did you see, or were you with the people at the time of the exhibition given by the General Film office of this play of Monte Cristo referred to in the stipulation, Exhibit B? A. I was.

Q. And were you also, or did you also witness a performance of that picture, and if so, where,

which theatre? A. It was a Delancey Street Theatre, on Delancey Street.

Q. Delancey Street? A. Delancey Street.

Q. Yes. Referring to that stipulation, paragraph five, Delancey Street Theatre, New York City? A. Yes, sir.

Q. Now, will you state to the Court just what that story as stated by that picture is. And if you have any memorandum there you may refresh your recollection by them? Start right from the beginning, and tell us the story in the picture? A. The story of the picture up to the ending of the first act in my play is taken from the novel—

Mr. Burkan: I object to that as a conclusion.

The Court: Don't say what it is taken from. Just describe the picture as you saw it.

The Witness: The picture describes a few scenes, unimportant scenes that are not in my play.

Q. Wouldn't it be better—

Mr. Burkan: I move to strike that out.

Q. If you have a little parallel copy you may refer to that; that will help along? A. I do not think I have that copy.

Q. Will this refresh your recollection so that you may testify more clearly and logically? (Book shown witness.) A. Shall I read that?

Q. If that directly states what you saw, yes? A. Yes, I am entirely familiar with this.

The Court: Can't that be marked?

Mr. Gerber: I think so.

Mr. Burkan: Anything that he prepared himself and knows something about, you may put in. Not the comparison.

214 Plaintiff's: James O'Neill—Direct

Mr. Gerber: Not the comparison, but the parallel columns so far as the picture is concerned.

Mr. Burkan: I do not want to be bound by their description, because in some respects it is incorrect.

215 The Court: You won't be bound at all, but it will save the time of the Court sitting here and listening to that as I have already read it. It seems to me it ought to be marked just the same as if the witness gave the evidence.

Mr. Burkan: It is not binding on the defendant, as to its accuracy?

Mr. Gerber: Certainly no; not bound as to accuracy of any of my testimony. The first paragraph which speaks of the picture part only, only the first column on pages 71, 72, 73, to 82 inclusive.

Received and marked Exhibit C.

Q. Of course you are familiar with your own play, and are you familiar with the book? A. Yes, sir.

216 Q. Have you gone over this comparison or parallel columns found on page 71 of the printed folio, which is entitled in this action? A. I have.

Q. And is that comparison accurate? A. Absolutely.

Mr. Gerber: Now, I offer in evidence for the assistance only of the Court, the parallel column.

Mr. Burkan: I object to that as incompetent, immaterial and irrelevant, as secondary evidence, and not the best evidence; that the novel and the pictures are the best

Argument

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evidence; and the comparison is not prepared by this witness in the chair himself.

Mr. Gerber: I only offer it as aiding your Honor when you read these volumes, and not binding on the defendant in any way, and not binding on the Court. Only for the assistance of the Court as they appear in my brief.

The Court: Yes, but are you going to offer the novel? Of course if you offer the novel and give a proper description of their play, and you have already put in the Fechter version, then you may put such a table in for the assistance of the Court, as I understand Mr. Burkan insists on having the novel put in. 218

Mr. Burkan: I object, your Honor, and furthermore if your Honor lets this in, I do not for a moment concede it is correct, and I should have to examine his witnesses in respect to each similiarity claimed, and to do that would take more time than your Honor desires to consume on this case. Why not do as they do in the Federal Court, put in the play, the novel and a description from the pictures, but I cannot permit Mr. Gerber to put this in, and allow it to stay there without correction, and that involves taking up eighty odd scenes, and any number of scenes in the Fechter version, and any number of scenes in the novel, and my client could not go to that work, neither could your Honor. 219

Mr. Gerber: You are not going to frighten anybody by that.

Mr. Burkan: I am not here to frighten anybody. I am here simply to try my case. If your Honor allows this to go in, then I have to cross-examine the witnesses as to each scene and show that it is not similar; and I have made a summary showing the scenes and where they come from. I do not claim it is any more binding on the Court than his is, but the moment you allow that to come in I have to prove all that.

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Mr. Gerber: My idea so far as that is concerned, would be to put in the novel, put in the comparison, and then call another witness to show the accuracy of this, in addition to this witness, and they are going to put in their comparison. I am not going to object to it going in, because they are only aids to the Court. Your Honor is going to see the picture and I think that is going to simplify the case.

222

The Court: You are certainly entitled in my judgment to put it in if you wish to do so. And I am going to let you try your case in your own way, so far as confining yourself to competent proof. But I do think that I could dispose of this issue to the satisfaction of both sides with this table submitted with the brief, after I read the play and see the film. If it is alleged to be inaccurate I think the inaccuracies ought to be thrashed out.

Mr. Burkan: That is what I will have to do on cross-examination.

The Court: Then I will overrule the objection.

An exception taken by Mr. Burkan.

Mr. Burkan: Do you offer in evidence the novel?

The Court: He withdraws the offer of the novel.

Mr. Gerber: I offer first the published novel of Monte Cristo.

Received and marked Exhibit D.

Mr. Gerber: Now I offer in evidence only as an aid to the Court the comparison, to the accuracy of which the witness has sworn, to the picture exhibited by the defendant, the play, Fletcher version, and the novel Count of Monte Cristo.

224

The Court: I have not heard him swear to the correctness of the tabulation.

Mr. Burkan: I object to it as incompetent, immaterial and irrelevant, secondary evidence, and not the best evidence, and it calls for the conclusion of the witness; was not prepared by the witness himself, or under his direction. Upon the further ground that the witness is performing a function which it is the part of the Court to perform, and in no wise binding on the defendant.

225

The Court: I will receive it as an aid to the Court.

Mr. Gerber: I offer it for that purpose.

The Court: I shall afford the other side the fullest opportunity to attack its accuracy by cross-examination or otherwise.

Mr. Burkan: I object, and except.

Q. Now, what is your answer respecting the accuracy of this comparison on page 71 apply to the

comparison that is continued down to page 82 of this volume? (Book shown witness.) A. I think it does. I am familiar with this; I have gone through it several times, and it is correct.

Mr. Gerber: I offer it in evidence only as an aid to the Court, this comparison.

Mr. Burkan: I object to it as I objected before. I make the same objection.

Same ruling and exception.

Marked Exhibit E, beginning on page 71 and continuing to page 82 inclusive.

227 Q. Has the production of your play been profitable and successful?

Mr. Burkan: I object to that as incompetent, immaterial and irrelevant.

Received and exception.

A. It has been very, very profitable.

Q. Did you make any arrangement after, or about that time, of exhibition given by the defendant of their picture for the production of their version of the Count of Monte Cristo with yourself in the part, for motion picture purposes? A. Yes.

228 Q. With what company? A. With the Famous Players Film Company.

Q. That is a company that is engaged in manufacturing and exhibiting motion pictures? A. Yes, sir.

Q. Were your pictures exhibited before or after? A. After.

Q. The injunction in this case? A. After.

Mr. Burkan: I object to that and I move to strike out that portion of the answer which refers to an injunction in this case.

Motion denied and exception.

In answer to Mr. Burkan—Cross-examination:

Q. Now, you made a contract with the Famous Players Company did you not in respect to those motion pictures? A. My contract is with Mr. Frohman.

Q. Mr. Daniel Frohman? A. Mr. Daniel Frohman.

Q. And was it under that contract that you and your company posed in the making of those motion pictures that were produced? A. By the Famous Players Company; yes, sir.

Q. Have you got your contract here? A. No, 230 sir.

Q. As I understand it you and your company gave an exhibition of that play of the so-called Fechter version of Monte Cristo before a camera? A. I never saw it.

Q. You never saw your own picture, you mean? A. Yes, sir.

Q. But you and your company— A. Not in full; I never saw it completed.

Q. But that picture was completed? A. Oh, it was completed, yes, sir.

Q. And that picture was exhibited after that time? A. I have never been able to see it. It 231 never could meet us.

Q. But you and your company did produce a production in motion pictures for the Famous Players Film Company? A. Yes, sir.

Q. And those pictures after completion were exhibited throughout the United States by the Famous Players Picture Company? A. Yes, sir.

Q. And state—those pictures were sold to various parties? A. I never heard of that.

Q. They were exhibited in Europe were they not? A. I believe so.

Q. And the films were sold for reproduction in Europe were they not? A. I don't know; I don't know anything about that.

Q. But they were produced in Europe? A. I heard they were going to produce them in Europe, but whether they have or not I do not know.

Q. Now did you ever see any advertising matter that was used by the Famous Players Film Company, in advertising your picture of the Count of Monte Cristo? (Paper shown witness.) A. Is this a copy of something.

233 Q. Yes. That is taken from a newspaper, the Daily Telegraph? A. Yes, sir.

Q. And that was used, wasn't it then, and that is the manner in which your picture was advertised? A. Well, if I had been consulted I would have worded it differently.

Q. But that was used to advertise this motion picture for which you posed? A. I suppose so. This is the first one I have ever seen of these. I never saw it.

Mr. Burkan: I offer that in evidence.

Received and marked Exhibit 1.

234 Q. Now, who was the man who was the stage director, directing this performance for the purpose of making this film? A. Mr. Porter.

Q. And Mr. Porter prepared the stage directions, did he not, which were used? A. Yes, sir; but we had I think two directors.

Q. Who were the two directors? A. One was an assistant Mr. Golden.

Q. Do you know his first name? A. I cannot remember his first name.

Q. Now, do you know from what those stage directions that were prepared for the manufac-

ture of this film Monte Cristo, that you posed for were prepared? A. They had my manuscript.

Q. You delivered your manuscript to them? A. Yes, sir.

Q. And that is the manuscript which was offered in evidence this morning? A. From a copy of it. I did not like to leave this out of my hands. I always clung to this manuscript.

Q. You delivered to Mr. Porter and Mr. Golden the acting representatives of the Famous Players Company a copy of your manuscript of the so-called Fechter version to aid them in making the 236 scenario that was used in making those pictures? A. Well, I think they consulted my manuscript.

Q. And those pictures were made from your manuscript? A. Yes.

Q. Now, I show you a description, and ask you to look at that and tell us whether that is the story of your play? (Paper shown witness.) A. Well, it is badly worded in the beginning. Edmond Dantes, a young man in the service of Pharon; Pharon was the name of a ship. Prior to the voyage he took leave of his invalid father and his sweetheart Mercedes, a tender farewell with Mercedes. 237

The Court: Read it and tell me if that is a correct story of your manuscript?

The Witness: These did not occur in my play.

Q. Did you pose for those scenes in the making of those pictures for the Famous Players Company? A. Some of them; but they were taken from the novel.

Q. Just read through. Have you read through that whole description? Just read it through? A. (After reading to himself.) Nearly all this

Plaintiff's: James O'Neill—Cross

matter has been taken from the novel that is nobody's property.

Q. There is no resemblance at all to your play?
A. Absolutely, there is; especially in the first part.

Q. Well, I ask you whether this paper that I now show you does not represent scenes and is a description of the picture that was made by the Famous Players Company in which you and your company appeared? A. There is a part that is a resemblance.

239 Q. Just point out which part? A. Up to the escape; up to the prison scene.

Q. Mention the reels? A. Reel one.

Q. Reel one resembles your play? A. That is all. That is all from the book.

Mr. Gerber. He asks what resembles your play as distinguished from the book.

Q. Does reel one resemble your play? A. No, it does not.

Q. Does reel two resemble your play? A. The part described here, the marriage, of Dantes and Mercedes occurs in my play. The half brother Noirtiers appears I think.

240 Q. That is in your play? A. And Villefort. That is about all in reel two.

Q. Now take reel three? A. Reel three does not resemble my play.

Q. Take reel four? A. Reel four for a few parts resembles my play.

Q. Which few; just locate the few parts? A. Monte Cristo's fabulous wealth. There is no doubt about Monte Cristo being fabulously wealthy.

Q. That resembles your play? A. Not as early as that in the play.

Plaintiff's: James O'Neill—Cross

Mr. Gerber: That is the Famous Players' picture?

Burkan: The Famous Players' picture. (Witness continues.) You speak of the play. I am comparing it with the play; not my picture. I suppose it would go. The picture is made after my play.

Q. I am not referring to the Famous Players' picture. I ask you whether the paper you have in your hand is not a description of the play for which you and your company posed?

242 Mr. Gerber: I object to that, as I am not interested in that. I am not interested in that play at all, and I am referring to the picture.

The Court: I suppose this applies to having that copy?

Mr. Burkan: Yes, sir.

Q. Don't you know that for that purpose of making motion pictures of that play of Monte Cristo, it was necessary to write out such directions and scenario?

The Court: He says he gave them the manuscript for that purpose.

243 A. Yes, sir, they got the copy of my manuscript.

Q. You and your company posed for that picture? A. My own production and no other, I was there at the time. Some of the directions were by me personally.

Q. Didn't you direct the making of this picture production of your play of Monte Cristo? A. Yes, sir.

Q. And as matter of fact wasn't it your play of Monte Cristo which was produced in this picture? A. Yes, sir.

Q. Every important scene, the entire play, and every important character that appeared in that play of Monte Cristo appeared on this picture?

A. Everything that is related to Monte Cristo as a play, yes, sir.

Q. And don't you know that Mr. Golden and Mr. Porter copyrighted this picture in which you and your company appeared? A. I suppose they have. I don't know that they have, positively.

Mr. Burkan: I now offer in evidence a copyright certificate issued by the Register of Copyrights showing that the Famous Players Film Company copyrighted the motion picture entitled "Count of Monte Cristo" by Edward S. Porter and Joseph Golden of the United States in five parts.

Mr. Gerber: I object to that as incompetent, immaterial and irrelevant, and not within the issues raised in the answer, and no such defense set up, and I do not care what the Famous Players Film Company did in the way of copyrighting their film.

The Court: I will receive it, and pass on the probative value afterwards.

Marked Exhibit 2.

Mr. Burkan: I now offer in evidence a copy of an application for securing of a copyright on the motion play the Count of Monte Cristo, applicant, Famous Players Film Company, Times Building, New York City.

Mr. Gerber: Same objection.

Same ruling and exception.

Marked Exhibit 3.

Also offered in evidence description

of the play filed at the same time that the application was filed in the office of the Register of Copyrights on the 16th day of December, 1912.

Same objection; same ruling and exception.

Marked Exhibit 4.

Q. Now, you testified that a man by the name of Webster appeared in a certain part, or roles, I think you indicated four. Has Mr. Webster ever appeared in this country? A. Not that I know of.

Q. Did you ever meet Mr. Webster in your life? 248

A. I never met him.

Q. Then your testimony here was not of your own personal knowledge was it, in regard to Mr. Webster? A. From my reading the annals of the stage.

Q. No, I ask you whether you testified of your own personal knowledge as to what Webster did? A. I know he did those things from hearsay, from hearing men tell me, as to the kind of actor, telling me what character of actor he was, and what parts he was great in.

Q. From what you heard from other people? 249

A. Told me by the profession.

Q. And in your reading and hearing about Webster you learned that he was the manager of the Adelphi Theatre in London, in 1868? A. Yes, sir.

Q. And for many years prior to that? A. Yes, sir.

Q. And that he was very successful as a manager, was he not? A. I think so.

Q. From your reading you also knew that Mr. Fechter appeared in the Adelphi Theatre in 1868, or about that time? A. Yes, sir.

Q. From your reading you also knew that a version of Count of Monte Cristo was played at the Adelphi Theatre, Strand, London, did you not? A. Yes, sir.

Q. You also learned that on the 19th of October, 1868, a dramatic version of the Count of Monte Cristo was produced at the Adelphi Theatre, Strand, London? A. Not by Mr. Fechter.

Q. I don't care anything about that, but I ask you whether you knew that on the 19th of October, 1868, there was produced at the Adelphi Theatre, Strand, London, a play known as Monte Cristo? A. I do not remember.

Q. Did you ever hear that Webster did play the part of Noirtiers quite frequently? A. Certainly.

Q. You so testified this morning? A. Yes, sir. Mr. Fechter wrote the part for him; yes, sir.

Q. So that you knew in 1868 there did appear a play known as Monte Cristo? A. That was the first performance of Monte Cristo in English.

Q. You say you learned from your reading that Mr. Fechter had written that version? A. He had written that, yes, sir.

Q. And did you ever see that version? A. Here is a copy of it.

Q. No, I ask you whether you ever saw the 1868 version of the Count of Monte Cristo? A. No, I never saw that version; that particular copy.

Q. No, I ask you whether you ever saw that version that was produced at the Adelphi Theatre, Strand, in 1868, whether you ever saw that? A. I cannot say that, because I did not compare them.

In answer to the Court:

Q. Did you ever see that 1868 version? Did you ever witness it, so far as you know? A. Now I cannot very well say that positively, because I am under the impression that I have the same copy there.

In answer to Mr. Burkan: No, I am not calling for your impression?

Mr. Gerber: That is exactly the point. It is exactly the same version.

The Witness: If it was Mr. Fechter's work it must have been the same.

The Court: He has answered the question. Go ahead.

Q. Do you now tell this Court that this version that you produced here in Court this morning was the same version that Mr. Fechter produced at the Adelphi Theatre, Strand, in 1868? A. With the exception of some slight changes.

Q. But you have testified a moment ago that you have never seen the 1868 version? A. No, but I know that it was very long. That is what I wanted to say before. The first of the Fechter version of Monte Cristo at the Adelphi Theatre in London, the curtain descended about half-past two in the morning. Some things were changed and had to be cut and changed a little, but the main points are in that manuscript there.

Q. Didn't you in an affidavit made by you and submitted to this Court, which was verified by you, on the 14th day of December 1912, testify as follows: "Fechter appeared in a version of Monte Cristo at the Adelphi Theatre in London in about 1869. This adaptation, however, was not the same adaptation which he afterwards wrote for Mr. Cheney"? A. It had to be changed—

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Q. No, did you so testify? A. Very likely.

Q. No question about it is there? A. No.

Q. Don't you know that when this 1868 version was produced that before its production a copy of the play was filed in the office of the Lord Chamberlain in London? A. No, sir.

Q. Did you ever hear of it? A. No, sir.

Q. You never came across that in your reading of this Monte Cristo? A. No, sir.

Q. Did you know that all the newspapers in London published long accounts of this play as
257 produced at the Adelphi Theatre, Strand, in 1868? A. I very seldom read the London papers.

Q. You never took any interest in that? A. Never.

Q. When was the last time that you ever saw this bill of sale that you say Mr. Stetson gave you for this so-called Fechter version of Monte Cristo? A. At the time I mailed it or sent it to Charles Patty.

Q. That was what year? A. Among other papers.

Q. That was what year? What year was that?
258 A. That was I think about I should say eight years—he died about eight years ago.

Q. You haven't seen it since? A. No, sir.

Q. Didn't keep a copy? A. I never had a copy.

Q. And you state to this Court that the last time you saw this bill of sale you remember that the wording of Cheney, or words of Cheney appeared on that bill of sale? A. To the best of my belief.

Q. Is that your best recollection? A. Well, you go back pretty far for me to venture to recollect the exact words of a given bill of sale.

Q. But do you tell the Court that? A. I cannot remember the exact words.

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Q. Do you tell his Honor the words "Mr. Cheney" or "Cheney" appeared on that bill of sale? A. To the best of my belief, yes.

Q. That is the best of your recollection? A. Yes, sir.

Q. And what day do you say you bought this play from Mr. Stetson? A. That was in June, 1885.

Q. June, 1885? A. Yes, sir; I think it was June; it was summer.

Q. Since June, 1885, you have presented this play, you say? A. I have, yes, sir. 260

Q. Now, you have heard of other versions of Monte Cristo besides the Fechter version have you? A. Yes.

Q. The French Lacy, or the French version? A. Yes, sir.

Q. You knew of the French Lacy version before you bought this, did you not? A. Well, yes, sir; I knew there was a French book of the Monte Cristo.

Q. Look at that and see if that is a copy of the French Lacy version? A. Yes, sir.

Q. Did you know that was in existence when you bought the play? A. Oh, yes. 261

Mr. Burkan: I offer it in evidence.

Received and marked Exhibit 5.

Q. You also knew, did you not at the time when you bought this play that Mr. Dumas had written or had made a dramatization of this play of Monte Cristo? A. I heard of such a dramatization.

Q. Have you ever seen it? A. I saw a copy of it a few months ago.

Q. In French or in English? A. In English, and read it.

Q. Please look at these three volumes and tell us whether that is a copy of what you read three years ago?

Mr. Gerber: I object to that. No objection to these books.

Mr. Burkan: I offer those in evidence. Received and marked Exhibit 6.

Mr. Burkan: I offer the translation in evidence.

Mr. Gerber: I cannot let the translation go in. I don't know who did it or anything about it.

The Court: I will receive it on your promise to prove it is a correct translation.

Mr. Burkan: I will connect it.

Marked Exhibit 7.

Q. I think you testified that Mr. Fechter was dead? A. Yes, sir.

Q. Am I correct in saying that he died in August, 1879? A. (Witness pauses.)

Q. He was dead some time before you got this play, was he not?

Mr. Gerber: He has testified to that.

A. Who?

Q. Mr. Charles Fechter? A. Yes, sir; about six years.

Q. That would make it about 1879? A. Yes, sir, very likely.

Q. You say you bought the play in 1885, and he died six years before that; that would make it 1879? A. Yes, sir.

Q. In your reading, or have you never heard that the widow of Mr. Fechter brought a suit against Mr. Stetson for an injunction to restrain Mr. Stetson from

producing this play now known as Monte Cristo? A. Yes, sir, there was such an action.

Q. You also know that before that suit came to trial Mrs. Fechter died, and that was the end of it? A. Yes, sir.

Q. That was so? A. Yes, sir.

Q. That was some time before you purchased this play? A. I do not know the exact settlement on the subject, or whether there was any settlement. I know the case was dropped against Mr. Stetson.

Q. Well, Mrs. Fechter died, and before testimony was taken, that is before testimony was taken Mrs. Fechter died? You know that, do you not? A. I am under the impression that the case was withdrawn on account of her death.

Q. On account of her death, and that was before you bought this play from Mr. Stetson? A. Yes, shortly before it.

Q. Now, you also know, do you not, from your reading that in 1873 Mr. Fechter came back to America and produced this so-called Fechter version at Daly's Theatre in New York? A. I remember he played it here; I don't know the exact date.

Q. You did not attend the performance? A. I did not, no, sir.

Q. And you cannot say whether it was the 1868 version, or some other version? A. I can say that there has been never but one version of Fechter's of the play.

Q. You never saw the London version? A. No, sir; but I know— Mr. Stetson and Mr.—

Q. No, no. I asked you if you ever saw the manuscript of the play known as Monte Cristo that was

produced at the Adelphi Theatre, Strand, London? A. I said I could not answer that positively; but the Fechter version I have there.

Q. Now, I ask you whether Mr. Fechter did not produce Monte Cristo here in 1873, and from 1873 until the time of his death in 1879? A. I think he did, yes, sir.

Q. And produced it from the manuscript in his possession? A. Yes, sir.

Q. Didn't you sign some contract or some paper between you and Mr. Daniel Frohman giving Mr. Frohman the right to exhibit in motion pictures this so-called Fechter version of Monte Cristo? A. Simply a memorandum contract.

Q. Did you get one copy and Mr. Frohman another? A. No; there was only one copy made.

Q. You kept that copy? A. No, sir; they retained it.

Q. Mr. Frohman retained it? A. Yes, sir.

Q. Do you know the contents of that paper? A. I gave him the right of making films of my play—the Fechter version of Monte Cristo.

Q. And it was under the terms of that contract with Mr. Frohman that you and your company posed? A. There was no contract, that was simply a memorandum.

Q. But it was in pursuance of all the terms of this memorandum that you and your company posed before a camera for the the making of motion pictures of this Monte Cristo? A. Yes, sir, that was the beginning of that agreement.

Q. Now, I show you what purports to be a copy of an article that appeared in the London Daily Telegraph, dated October 19, 1868, and ask you to look on page 6 and all pages following and tell

me whether that is a substantially correct description of your play Monte Cristo?

Mr. Gerber: I object to that as the purest waste of time.

Mr. Burkan: I propose to show that under the English law that the performance was a publication, and that the newspapers were justified in publishing any narrative, and that that was two years previous to the time they say they engaged Fechter to write this play, and that if it was public property there can be no other than a judgment for the defendant.

The Court: The people who saw it had a perfect right to describe what they saw, and authorizing their description would not be anything more as matter of law than what some newspaper writer gave to the public. I understand you are going to put the play in evidence?

Mr. Burkan: Yes, sir.

The Court: That will be sufficient.

Objection sustained and exception.

Marked Exhibit 8 for identification.

Q. Now, at the time that you appeared for Stetson in this play of Monte Cristo, Mr. Stetson advertised the play, using pictorial posters, did he not depicting the scenes—and copyrighted them—of this play? A. For advertising purposes, yes, sir.

Q. I show you a poster and ask you if that is one? (Paper shown witness.) A. That is one of the scenes of my play.

Q. And that poster— A. That was used for advertising purposes.

Mr. Burkan: I offer that in evidence.

Plaintiff's: James O'Neill—Cross

Mr. Gerber: I object to that as immaterial.

The Court: I will pass upon it on the decision. I will overrule the objection if I admit it.

Marked Exhibit 9.

Q. I show you this poster and ask you if this was the poster that was used to advertise the play? (Picture shown witness.) A. Yes, sir. That is my print.

Mr. Burkan: I offer it in evidence.

Same objection.

Allowed and exception.

The Witness: It is the second act of my play.

(Marked Exhibit 10.)

Q. Now, these posters were posted on billboards at public places throughout the country, were they not? A. Yes.

Q. No restriction was printed upon the posters of any kind? A. No, put out anywhere, posted on the walls, or put them in the windows; simply for advertising purposes.

Q. And those posters depict the striking or most important climaxes of some of the acts and scenes? A. Yes, sir.

Q. And this poster marked Defendant's Exhibit 9 shows Monte Cristo on the rocks?

The Court: We know what it shows.

Q. It speaks for itself. Now for the purpose of making this poster you had flashlight photographs taken, did you not? A. Sometimes.

Q. Now, I show you a series of photographs, and some of the scenes of your play from which those posters were made? (Photographs shown witness.) A. Yes.

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Q. Those are all made for advertising purposes? A. This was a great revival of Monte Cristo; and these are all mine. I had to advertise the play. These are flashlight pictures of my play.

Mr. Burkan: I offer them in evidence.

Received and marked 11 to 19 inclusive.

Q. Now, there are a great many other scenes depicted upon your posters were there not? A. I don't know how many. Yes. They would have single pictures of the different characters, showing their costumes and lots of things.

Q. Now, you had posters showing the very last act of Monte Cristo, did you not, showing Danglars and the Count of Monte Cristo having a duel? A. Yes, sir.

Q. And another picture showing the death of Danglars and the reconciliation between Mercedes and Edmond, and also a picture showing Dantes embracing Albert? A. Yes, sir.

Q. Then you had also a picture of Albert challenging the Count of Monte Cristo, and then his grabbing Albert and accepting the challenge? A. I do not recollect that. We may have had it.

Q. I show you a picture. Does not Exhibit 14 show that scene? (Paper shown witness.) A. Yes, that is in the last act; that is the end of the fourth act.

Q. The fourth act? A. Yes, sir. There is no duel in that scene. That is the end of the fourth act.

Q. That picture shows Dantes seizing Albert? A. No.

Q. What does it show? A. It shows Edmond Dantes seizing Albert's arm, and Mercedes coming down the stage after the challenge is made, and

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Edmond Dantes says he will return the glove wrapped around a bullet. She comes down behind, Mercedes, and says "Edmond, you will not." "I will kill him." Mercedes said "Edmond you will not harm a hair of his head." "Why not?" "Because he is your son."

Q. Now, I show you Defendant's Exhibit 14, and ask you whether that does not show the duel between Danglars and Dantes? (Photograph shown witness.) A. Yes, sir; this is it.

281 Q. I show you Defendant's Exhibit 12 and ask you whether that does not show Danglars dead, and the reconciliation between Mercedes and Albert? (Photograph shown witness.) A. By looking at all these pictures I can tell you they were all mine. This is mine.

Q. And they were all used—these pictures depicting particular scenes from your play? A. Yes, sir.

Q. And were used to advertise the play? A. Yes, sir.

282 Q. I show you Defendant's Exhibit No. 17 and ask you whether that does not show the death of LaCarconte, death of Villefort, Noirtiers coming down the stairs, and the Abbe Busoni making the statement "One"? A. This is the end of my third act, yes sir.

Q. Now, the incident of Dantes on the rocks with his arms outstretched and underneath the line "The world is mine" that you used as a poster, did you not? A. Yes, sir.

Q. That was advertised all over? A. Broadcast, yes, sir. That is what we had it made for.

Q. You also advertised the picture of Villefort making inquiries of Dantes? A. Second act, yes, sir.

Plaintiff's: James O'Neill—Cross

Q. You also had pictures showing Villefort visiting the Chateau d'If? A. Yes.

Q. You also had a picture showing the wedding fete of Mercedes and Edmond? A. Yes, sir. I also had Noirtiers in the picture. That shows Villefort instead of Noirtiers.

Q. Now, did you ever in any affidavit you ever made in this action or in any other case, state in words or in substance that there was a bill of sale from Stetson to you in respect of this play Monte Cristo? A. If the question was asked it must be in my affidavit.

284 Q. Well, it is not in any affidavit that you have ever submitted in this case? A. Then the question never came up.

Mr. Gerber: I object to that as not proper. If there is anything in any affidavit he may call his attention to it.

The Court: He may ask whether he recollects ever having done so.

Q. Do you recollect of ever stating in any affidavit either in this case or any other case anything to the effect that a bill of sale passed from Stetson to you? A. I don't think I ever mentioned it. I don't think the question was put to me. I do not remember anything being said about a bill of sale.

285 Q. Now please turn to page 72 of the comparison under the head of "Dantes' return home" in the first column. You see there that in the play Dantes does not meet Morrell until he sees him at the Reserve. He meets Dantes and asks about a letter, and is told he would receive it within an hour. Then on the next column you see Dantes meets Morrell and tells him of the visit to Elba.

Plaintiff's: James O'Neill—Cross

Noirtiers does not appear in the book until after Dantes escapes from prison. Do you want the Court to understand that Noirtiers does not appear in any part of the Dumas Dramatization in any part of the plot—that Noirtiers does not appear until after the escape of Dantes from the Chateau d'If? A. I have said that he appeared on the first scene of the play.

Q. Well, don't you intend— A. He was in the second act before the escape.

287 Q. Isn't it your claim that Noirtiers appearance to the time that Dantes appears in the Chateau d'If, escaping, is peculiar to your play? A. Well, it appears in my play.

Q. You claim that is peculiar to your play, you say that Noirtiers appears at this time, at the La Reserve and that is entirely original with Fechter? A. In the first scene he appears in the play and in the novel, and every other scene. After that he disappears and is not seen again in the play. While in my play he is in almost every scene of the play.

288 Q. Well, do you say that because in the defendant's pictures Noirtiers speaks to Dantes, at the La Reserve that that was a plagiarism? A. In what scene is that?

Q. On page 72, under the heading "Dantes returns home," the first column, in referring to our picture you say this is not shown there. Now, you recollect that Noirtiers speaks to Dantes. Dantes shows him a ring. Danglars standing back. Now did you claim that we have plagiarised any of those incidents—any scene of your play because of this incident depicted in our pictures? A. Nearly every scene.

Plaintiff's: James O'Neill—Cross

Q. I am talking about this particular scene. Do you claim any infringement on our part because we show Noirtiers talking to Dantes at this part of our picture? A. I have before said that he appears for one other scene in the first act and speaks to Noirtiers or Danglars. He has asked him a few words—asked him about the record of the ship. I say that after that in the play, or in the pictures is an infringement of my play. After that one scene.

Q. So, do you claim at this point where Noirtiers speaks to Dantes, do you claim at this point we have infringed your play? A. Not up to that point. 290

Q. You make no claim do you that this scene showing Dantes talking to Noirtiers, that is an infringement of any part of your play?

The Court: He points that out as evidence of infringement as I understand.

A. Every scene but that.

Q. Don't you know that in the Dumas dramatization which was offered in evidence that this identical scene appears in Act II, Part I, on the pages 16, 17, 18, 19 and 20? 291

Mr. Gerber: Is this making any headway? That is in evidence. He is going to refer your Honor to them. This witness has never seen the dramatization.

The Court: That will answer the question of course. You are going to point those things out?

Mr. Burkan: Yes, sir. But here is a man that says this comparison is absolutely correct, and there is only one conclusion, and that is because it does not appear in the novel, consequently it is stolen from him.

Plaintiff's: James O'Neill—Cross

The Court: I am not interested in that at all.

Mr. Burkan: I know, but he is on the stand, and I propose to show by the French version that these pictures are depicted and portrayed in other versions, and the mere fact that he does not appear, does not make it a plagiarism. It shows his comparison is inaccurate.

The Court: That is what you are going to point out in your comparison. I do not see why we should take the time in asking him all the time, particularly as he has not read the translation.

(At recess the Court adjourned until four o'clock for the purpose of inspecting the special demonstration of the film complained of.)

After recess.

JAMES O'NEILL, re-called:

(By consent of counsel for plaintiff and the defendant the Court in the presence of counsel for both sides saw the motion pictures exhibited by the General Film Company at the office of the General Film Company.)

In answer to Mr. Burkan:

CROSS-EXAMINATION (continued):

Q. Who prepared this comparison that is found on pages 71 to 82 of the record? A. I don't know.

Plaintiff's: James O'Neill—Cross

Q. You testified this morning that you have never read the Dumas dramatization, and consequently you cannot state whether any of the incidents described in the picture are also contained in the Dumas translation. A. I have not read it thoroughly. I have glanced through it. I have not read it thoroughly, but glanced through it.

Q. But I mean you are not sufficiently familiar with it to indicate those scenes contained in the defendant's pictures which are also contained in Dumas' dramatization? A. I think part of them, yes, sir.

Q. Now this morning I understood you to say in respect to the Dumas dramatization that you had never seen it.

Mr. Gerber: He said he had not seen this.

Q. Which Dumas dramatization did you see? A. I have seen a copy of it.

Q. A translation of it? A. Yes.

Q. When did you see it? A. I saw it first three or four months ago.

Q. In whose office? A. Well, I cannot remember.

Q. Mr. Gerber's office? A. I think it was handed to me, and asked me to look it over.

Q. Who handed it to you? A. I cannot exactly remember who it was.

Q. Now this person who prepared this comparison made no reference to the Dumas dramatization at all, did he? Whoever it was prepared this comparison? A. Not to me.

Q. And he made no reference to the French Lacy version, did he? A. There is in the—

Q. Does the comparison that you used and which was offered in evidence by your counsel this

morning, indicate that the person who made the comparison referred in any shape or manner or way to the Dumas translation or French Lacy version? A. Certainly, she did.

Q. So that you can state whether or not any of the incidents contained in the pictures are also referred to and contained in the Dumas dramatization and French Lacy version? A. Not after the escape from prison.

299 Q. You complain, in your bill of particulars, do you not, that the incident in the pictures showing Morrell giving Dante his Captain's paper as a wedding present, is taken from Act I., Scene I., of your play, do you not? A. No, sir.

Q. Will you please look at your bill of particulars and refresh your recollection? A. I do not remember it in that connection.

Q. (Paper shown witness.) A. That is right. Morrell does give Dante his papers as captain in the first act of my play.

Q. And you claim that is an infringement of your play, that that incident was referred to only in your play, and not in any other version— A. I want to say it is not referred to in words.

300 Q. Do you say that you are familiar with the French Lacy version? A. Yes.

Q. Now, isn't it a fact that on page 17 in the French Lacy version, you find the following: "Morrell: A moment (giving Edmond a paper). Read, Edmond." Edmond: My captain's commission, signed by you and your partner. Oh, Monsieur Morrell. Mercedes' father to Morrell. This is my wedding present. Edmond: Good friend. Thank Mr. Morrell for me. I have no words with which to speak my gratitude." A. That is all taken from the novel.

Q. Now, don't you in your bill of particulars claim that infringes your play, that depicting that incident in our picture? A. I had the first claim to it.

Q. And you stated also in an affidavit, when you are supposed to have bought this play from Mr. Stetson, that you knew of the existence of the French Lacy version, did you not? A. I never had it in my possession, and I did not know its contents until afterwards, in some of my controversies with people whom I sued for using that version, then I had to look over it and I became 302 thoroughly familiar with it.

Q. Now I ask you whether you now make the claim that the incident depicted in our picture showing Morrell presenting Dante his captain's commission, whether you claim that is an infringement of your play? A. In this arrangement; different arrangement; different time.

Q. Let me see your arrangement. In your play that scene is depicted at the betrothal feast. In the picture it is shown in the room of Father Dantes, isn't it? A. I don't remember.

Q. Well, do you remember the event? The sequence of the event as depicted in the pictures? 303 A. I know that it took place in mine.

Q. Don't you know that it took place in the attic room of Father Dantes? A. That may be so in the play.

Q. Isn't it so, that in our pictures that particular scene is indicated in the attic room of Father Dantes; Dantes comes in to see his father and embraces the father; Morrell comes in, and Cadrouse comes in, and then and there Morrell hands the paper to Dantes, and says, "Here are

your papers," or "Here is your commission"! Isn't that so? A. Yes, sir; but we give a different picture of it, I think. We had it an exterior.

Q. And it was daytime, also, wasn't it? A. I think so.

Q. Making it at the betrothal feast when all these parties are gathered at this feast in the tavern? A. No, sir; it is in the open.

Q. That is at the time of the feast? A. Well, in our pictures it is shown at a time when Dantes returns from this trip; and led up to a different
305 arrangement; different arrangement.

Q. The arrangement is entirely different? A. Yes, sir; the position of the characters is entirely different.

Q. And the arrangement in the French Lacy version is also entirely different, too, isn't it?

Mr. Gerber: I object to that, as making no headway.

The Court: What is the fact; is it different in yours?

Mr. Burkan: Absolutely different.

The Court: Call attention to and state
306 on the record the difference.

Mr. Burkan: I will point that out when my experts come.

A. It takes place in our play at the end of the first act. That is an entirely different arrangement from either this book or the novel. That is what I have contended right along. They have it in an interior.

Q. And a great many of the scenes depicted or shown in your play are not shown in the defendant's pictures, are they? A. Nearly all the principal pictures are taken from my play after the escape from prison.

Q. No, I did not ask you that.

Mr. Burkan: I move to strike that out.

Mr. Gerber: That is an answer. Allowed to stand, and exception taken.

Q. Now, let us see: The escape is shown on the third reel of our pictures, isn't it? A. I think so, yes, sir.

Q. Is the scene in Act III., Scene I., in your play, between Caderouse and a brigadier, and Le Concot shown in one of our pictures? A. He is in only one scene of that act in the play.

Q. No, I ask you whether that particular situa- 308
tion is shown in our picture? A. The people are discovered in the same manner as they are discovered in our play.

Q. No, I ask you whether that particular situation is shown in our picture, having a conversation between Caderouse and the brigadier? A. The same thing in my play.

Q. Is the brigadier shown in our pictures? Is any brigadier after the escape shown in our pictures at any time from the escape? You have told the Court that almost every scene of your play is in our pictures. Now start with the very
309 first scene?

The Court: After the escape?

Q. After the escape, yes. A. The scenes are exactly the same as mine.

Q. Is there a brigadier in our pictures? A. There may be.

Q. The scene at the Poht du Gard. I ask you if there is any soldier shown, or any brigadier shown, in the Pont du Gard, or in connection at all with that particular scene? A. I am not sure whether it was in that or not. The characters—

I was looking at the characters; not at the ensemble.

Q. The meeting between Edmond and Albert; Albert, Edmond, and the brigadier. Is that shown in our picture? A. I think not. I don't think Albert came in on this picture. I think it was in the original picture which I saw.

Q. Now, are you testifying from your own knowledge, or from what you have seen, or what you believe? A. What I believe.

311 Q. Did you see the picture? A. Yes, sir.

Q. You did not see that in the defendant's picture? A. No, sir, I did not.

Q. When was the last time that you saw the picture up to today? A. The Delancey Street picture.

The Court: We are going on the one we saw today.

Q. That particular scene between the brigadier and Edmond and Albert is not shown in the defendant's pictures, is it? A. There is no brigadier in it. The scenes are the same.

312 Q. Please answer my question. A. I say the picture is mine.

Q. Now I ask you again whether the incident contained in Act III, Scene 1, on pages 60, 61 and 62 of your play showing the conversation between Albert, a brigadier and Edmond, whether this particular incident is shown in our picture? A. Today in the third act?

Q. In any act. A. Albert and Mercedes?

Q. No, Albert, a brigadier and Edmond? A. There was no brigadier there.

Q. And that scene is not shown, is it, in our pictures at all? A. Well, that particularly— I

don't recall seeing any soldiers there, or any brigadier, in that scene. That was all the difference.

Q. You know from your reading that you have testified to this morning, that Mr. Fechter played at the Adelphi Theatre, Strand, under Mr. Webster's management, for quite some time? A. Yes, sir.

Q. He was employed there as an actor? A. As a star, yes, sir.

Q. And you know that Webster appeared in a great many plays? A. Well, I don't know that. I know Webster appeared with him in this play. 314

Q. In this particular play? A. Yes, sir.

Q. That was in 1868? A. I think so.

In answer to Mr. Gerber:

Q. Only one question: You were asked about your bill of sale, and requested to state whether you referred to that in your affidavit. I call your attention to your affidavit, which purports to be sworn to November 13th, 1912, and ask you whether you did not state as follows: "That thereafter, and on or about the 15th of June 1886—

Q. That is a mistake for 1885 isn't it? A. 1885.

In answer to the Court:

Q. "I purchased from the said John Stetson the said manuscript for said play of Monte Cristo, and ever since have been the exclusive owner of the same by virtue of the purchase of said manuscript"— A. That is right. 315

Q. Is there any other purchase than the one to which this bill of sale had reference? A. No, sir.

In answer to Mr. Burkan:

Q. Do you remember whether you paid this money to Mr. Stetson in cash or by check? A. I paid it by check.

316 Plaintiff's: Joseph Frost—Direct

Q. Do you remember what bank? A. I think it was the Bank of the Metropolis here.

Q. Did you keep the voucher? A. Not after seven years.

Q. Did you destroy the voucher? A. I did. I make that a rule after seven years.

Q. You never made a copy of the bill of sale?
A. No, I had it in my possession until I sent it up to Charlie Patty.

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JOSEPH FROST, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

In answer to Mr. Gerber direct-examination:

Q. Where do you reside? A. Sixteen Fourth Avenue, Brooklyn.

Q. What is your business? A. Clerk in the County Clerk's office of Kings County.

Q. Of the Supreme Court? A. Kings County.

Q. You have produced certain records from the files. Have you those records? A. I have.

318 Q. Will you produce them please? A. (Producing certain papers.)

Q. You produce certain records in an action brought in the New York Supreme Court, Kings County, John Stetson against James B. Studley. Were they taken from the files of that Court? A. They were.

Mr. Gerber: I offer in evidence the sworn complaint of John Stetson, in the suit of John Stetson against James B. Studley, the complaint is sworn to on September 11, 1884, in said action. The papers seem to

Argument

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have been filed on April 6, 1886. I offer to read in evidence the sworn statement of Mr. Stetson, giving the date and the time of the purchase by him—

Burkan: I object to that.

Mr. Gerber: I don't want this to go on the record. I only offer paragraph 6.

Mr. Burkan: I object to it as incompetent, and it is a conclusion, and it is a self-serving declaration.

Mr. Gerber: I offer it not to overcome 320 any paper adverse title, which they may have, if they have one—their pleadings show none, and they have none; but only in support—not the paper title that is adverse, but the title that has continued from 1885 down. I offer to show the nature of his possession as he claimed at that time.

The Court: I will receive it and give you the exception.

Mr. Burkan: I object to it on the ground that the complaint is not an official record, on the ground that the declaration contained in paragraph 6, which they are now offering in evidence, is self-serving, hearsay, and not binding on the defendant. That this defendant is not a party to such suit. That this defendant has not had an opportunity of cross-examining the declarant. On the ground the declarations are irrelevant, they are incompetent and immaterial. And they are conclusions of the witness, and they are not statements of facts, but conclusions and opinions of the declar-

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322 Plaintiff's: Charles W. Wilder—Direct

ant, and do not amount to legal evidence. I object to it on each and every ground stated.

Objection overruled, and exception.

Paragraph 6 received and considered marked Exhibit F.

No cross-examination.

323 CHARLES W. WILDER, a witness called on behalf of the plaintiff, being duly sworn, testifies as follows:

In answer to Mr. Gerber—Direct-examination:

Q. What is your business? A. Billiard business.

Q. Where? A. 1947 Broadway.

Q. Where do you live? A. 202 West 74th Street.

Q. Do you know Mr. James O'Neill? A. Very well, yes, sir.

324 Q. Did you know Mr. John Stetson in his lifetime? A. I did.

Q. How many years did you know him prior to his death? A. Well, from the time I was a very small boy.

Q. Did you know him intimately? A. Very.

Q. Where was he living in Boston; at what hotel, prior to his death? A. Which house?

Q. Yes. A. He was living in his house in Commonwealth Avenue.

Q. And where were you living; at Clark's Hotel? A. At that time?

Q. Yes. A. At the time of his death I was living in New York, at that time of his death.

Plaintiff's: Charles W. Wilder—Direct

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Q. Going back, prior to 1885, did you meet him frequently? A. Every day.

Q. Where? A. Well, at his house at that time; he was living in Haywood Place in Boston.

Q. Did you have any talk with Mr. Stetson on the subject of his possession of the play, "Monte Cristo"? A. Very often.

Q. State, if you please, what he said in respect of his possession prior to June, 1885, and, well, back, say 1883 and 1885.

Mr. Burkan: I object to that as incompetent, immaterial and irrelevant, and not 326 binding on this defendant, and as hearsay.

Mr. Gerber: Only for the purpose of showing how Mr. Stetson characterized, or claimed ownership, the nature of his possession at the time.

Mr. Burkan: I object as incompetent, immaterial and irrelevant, and as a self-serving declaration.

Objection overruled, and exception.

A. Well, at some time subsequent to 1883 I know we had several discussions regarding "Monte Cristo," the play which I had seen Fechter do, and he remarked that if he could only 327 find somebody, or knew somebody who could play the part, he would like to do so. I told him I understand, or I knew of a man that I thought could play it, a man, Mr. O'Neill. Well, he said he thought so himself. He said he thought a great deal of money could be made with that if he could find a romantic actor that Fechter was, but he did not know of one, but he did not know that O'Neill was good enough for that. At that time I believe O'Neill was playing an engagement, I

Plaintiff's: Charles W. Wilder—Cross

know in Albany. He got in touch with O'Neill, and they made an arrangement to play "Monte Cristo" in New York. That was 1883.

Q. Do you remember about the time the play is claimed to have been sold to Mr. O'Neill by Mr. Stetson? A. Yes, sir.

Q. Between those two periods did you have any talk with Mr. Stetson respecting the nature of his possession, or ownership of this play?

329 Mr. Burkan: I object to that as incompetent, immaterial and irrelevant, and as a self-serving declaration, and not binding on the defendant, and on the grounds of my previous objection.

Same ruling and exception.

Q. What did he say in respect to his possession or ownership of the play "Monte Cristo"? A. He owned the play, that he had bought it when he took over all the holdings of Arthur Cheney at the time he purchased the Globe Theatre.

In answer to Mr. Burkan—Cross-examination:

330 Q. Are you a lawyer? A. No, sir.

Q. Have you ever testified before for Mr. O'Neill? A. No, sir.

Q. Did you ever make an affidavit for Mr. O'Neill? A. No, sir.

Q. Did you ever make one for Mr. O'Neill? A. No, sir.

Q. Did you ever make one in any case that he started against anybody in connection with "Monte Cristo"? A. No, sir.

Q. Did you ever make an affidavit for Mr. Stetson in any case that he brought? A. Never.

Q. When did you get into touch with Mr.

Plaintiff's: Charles W. Wilder—Cross

O'Neill in respect of this particular case? A. Well, Mr. O'Neill called on me perhaps a matter of five or six weeks ago.

Q. Came to your house in Boston? A. No, sir. My home here in New York.

Q. New York City? A. Or my place of business.

Q. Who else came with Mr. O'Neill? A. Nobody.

Q. Were you taken to a lawyer's office? A. I went to a lawyer's office.

Q. To Mr. Gerber's office? A. I was; it was in Mr. Knox's.

Q. Before you saw Mr. Knox, Mr. O'Neill had talked with you at your home, had he not? A. No, he had not.

Q. Simply took you right down to Mr. Gerber's office? A. He did not do that.

Q. Did he have a talk with you before he brought you down to the office? A. He simply walked in my place of business and told me regarding some suit which he had brought against some motion picture concern.

Q. The General Film Company? A. Yes, sir.

Q. And told you that he had to prove that Stetson was the owner of the play? A. No, sir; he did not.

Q. Was not that question discussed at all, the question of the ownership of the play? A. It was, he simply said that he had been to Boston, and had seen two gentlemen there, and got affidavits regarding his ownership of "Monte Cristo," and he said, "I would like to have you come down to Mr. Dittenhoefer's office and see them." I said to him, "I will, with pleasure."

Q. That was all that was said on the subject of the ownership? A. Nothing more was said.

334 Plaintiff's: Charles W. Wilder—Cross

Q. He did not ask you what you remembered?
A. He did not.

Q. And he did not ask you whether you had ever had those talks with Mr. Stetson in his lifetime? A. Why, he knew that.

Q. He remembered that? A. Well, he knew it because it was open to negotiation on this sale, and I was the particular one that made him buy it after we discovered it.

335 Q. And he knew that two years before that in 1883 Stetson told you that he had some transaction with Cheney which resulted in the transfer of that play? A. I don't know whether Mr. O'Neill knew that or not. I could not tell you.

Q. Did you tell him about that, that you were present two years prior and had some interview with Mr. Stetson regarding this play? A. No, I don't know that I did. I may have. Mr. O'Neill and I at that time—

Q. Do you remember what you told Mr. O'Neill in that regard? A. In regard to the—

Q. This question of ownership of the play? A. No, I do not recall it.

336 Q. Well, you were very friendly with Stetson, were you? A. Very.

Q. And he told you his business? A. Oh, while we were discussing this question, that was all.

Q. And of course he told you that two years before, in 1883, that he had some transaction with Cheney, which resulted in his acquiring the "Monte Cristo" play? A. Yes, sir; all his friends knew that in Boston.

Q. He told you and all of his friends? A.

Plaintiff's: Charles W. Wilder—Cross 337

Those few that used to meet him every day and every evening.

Q. Did he tell you that Mr. or Mrs. Fechter, in 1883 had brought a suit against him to prevent him from giving further performances of this play, on the ground it was not his? A. I don't recall that.

Q. Do you recall that Mr. Fechter, or Mrs. Fechter brought an action against Mr. Stetson, claiming he was not the owner of the play? A. I heard something of that kind of a suit.

Q. You knew about the prosecution of that suit 338 by Mrs. Fechter, did you? A. Yes, sir.

Q. Did Mr. Stetson ask you to furnish any affidavit to be used in that suit? A. He did not, no, sir.

Q. Now, when Mr. O'Neill brought you to Mr. Knox's office, you and he had a talk? A. Yes, sir.

Q. You were told by Mr. O'Neill that the success in a case of this kind was in his establishing that Stetson was the owner of that play? A. No, sir.

Q. And you did not realize that at all? A. I 339 did realize that, yes, sir; and I knew that Mr. O'Neill some time ago had told me regarding losing the bill of sale which he had; I knew that at that time, after Charles Patty died, the lawyer in Boston.

Q. What else did he tell you about this question of ownership? Anything else? A. Nothing particularly; nothing except I knew he was the owner. Virtually I was present at the time he bought it, but I was with him the day before, or the night before, and at that time when he did

buy it. I knew that he had bought it and paid for it, because we had several—

Q. Were you present at that time? A. I was not present at the time.

Q. Do you know what he paid for it? A. \$2,000 yes, sir.

Q. For this play and other plays? A. He bought that play, and the preparation and some print that he had to take, or agreed to take.

341 Q. What kind of print? A. Theatrical print that was to be used, to go out in the future, that he had contracted for, and agreed to take.

Q. Theatrical posters depicting the different scenes of this play? A. Yes, sir.

Q. Did you see the performance of this play during the time that you knew Stetson? A. I knew it from the first act, Counsellor, every word of it, and I have seen it many times.

Q. You knew there were a great many posters made of it? A. A great many.

Q. Depicting the various scenes and various acts of this play? A. Yes, sir.

342 Q. And it was advertised broadcast? A. Yes, sir.

Q. And the climaxes in the play were depicted? A. Yes, sir.

Q. And the great scenes? A. Yes, sir.

Q. And the advertising was a great feature in connection with "Monte Cristo", wasn't it? A. Yes, sir I think it was.

Q. And one of the considerations when Mr. O'Neill bought the play was the taking over of this mass of print? A. Yes, sir.

Q. Did you ever tell any other person besides Mr. O'Neill that you knew about this transaction

between Stetson and Cheney in 1883? A. You mean within the last year, or two, or two or three years?

Q. Yes. A. No.

Q. Well, now, you also knew, and going back two or three or four years, did you ever tell any person since 1883 that you knew anything about the circumstances connected with Stetson's acquiring this play? A. Oh, yes. Since 1883?

Q. Yes. A. Certainly.

Q. You told a great many people? A. Not a great many people; I cannot now exactly tell, but 344 I know I have had a great many discussions concerning "Monte Cristo", it being so popular, etc., and Mr. O'Neill having made so much money out of it, and I also took to my self partly the credit of his buying it.

Q. Do you know the Fechter play of "Monte Cristo"? A. Yes, sir.

Q. You know that Mr. Fechter played "Monte Cristo" from 1873 down to the time of his death, don't you? A. Yes, sir.

Q. He played it at Daly's Theatre in New York, didn't he? A. I do not recall. I saw him 345 play it in Boston.

Q. You know that he continued right on? A. I think I saw him play it in the 14th Street Theatre here in New York, and also Ruy Blas.

Q. You know he died in the summer of 1879? A. Yes, sir.

Q. You know that up to the day of his death Mr. Fechter produced that play? A. I do.

346 Plaintiff's: Edwin S. Porter—Direct

EDWIN S. PORTER, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

In answer to Mr. Gerber-Direct-examination:

Q. What is your business? A. Producing motion pictures.

Q. And you are what is termed a director in motion picture manufacture? A. Yes, sir.

Q. Connected with what concern? A. The Famous Players' Film Company.

347 Q. You have been connected with them for a good many years? A. About three years.

Q. Prior to that were you connected with any other motion picture manufactory? A. Yes, sir; I had a company of my own, the Rex Company, Universal Manufacturing Company; ten years with the Edison Manufacturing Company.

Q. You are the head director, are you not of the Famous Players Film Company? A. I am.

Q. Now, will you tell the Court briefly how a motion picture is made; take it from the time you get the manuscript. A. From the time we read
348 the manuscript?

Q. Yes, assuming the manuscript to be written? A. Well, in the first place we cast our picture after selecting such characters as are there are for the parts. We get our scene forms, property forms, start to build the scenery, and obtain such properties as are necessary; we costume the picture, or the people; get them together, and read the play over, and tell each one their part that they are to take; give them their part to study, and when the scenery is ready we start in to rehearse the various scenes.

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In answer to the Court: Q. What do you mean by rehearse? A. Well, we take up each scene. For instance we do not take our pictures consecutively. For instance, you have one set we may use in eight or ten different scenes. It may be scene No. 1, No. 3, 10, 100. We take up each seperately; use scene No. 1; we rehearse our play thoroughly in just that one scene.

Q. Do you mean that they repeat the lines as they are going through the action? A. Certainly in the picture we eliminate only such dialogue as is actually necessary to portray the motion and suggestion. We print the lines; we do take the actual lines of the play, but just such lines as will portray a certain part, and we rehearse those lines, and the mechanics, as it were in general, and when we have the final rehearsal everything is running smoothly, we start the camera and go through it without the talking of that scene. Then after that is done we take up the next scene, and that is set. It may be 5, or No. 10, go through the same process. In some cases we have the studio and scene painters sufficiently ahead with sets we set up, as high as eight or ten sets. In the other cases we work consecutively. We go from one set to another, giving the continuity, so that we may number the entrances, and how they are dressed, etc.

Q. Do you actually give the lines of each part for each actor who is supposed to have a speaking part? A. No. we just give them the general business; a brief synopsis, and those lines are rehearsed at the time we rehearse that scene. We give them the lines as we explain in the busi-

ness to them, and rehearse. It is mostly built up at the time, that is at the time we go on the stage and take the picture.

In answer to Mr. Gerber: Q. Take an important scene with an important incident, are any lines spoken by the artists before the camera? A. Absolutely.

Q. Those are always used to give effectiveness to the visibleness of it? A. Effectiveness to it.

Q. Do you hire good actresses and actors? A. Yes, sir.

353 Q. The same as you do in a regular production? A. The same as we do in a regular production.

Q. Do you costume them? A. We costume them, yes.

Q. And have the scenery built? A. Some painted specially for that production.

Q. Then they go through the regular play or performance, after rehearsing? A. Yes, sir.

Q. That is, before high speed, isn't it? A. Yes, sir.

354 Q. Then the negative is developed from that, and then you manufacture your set from the negative developed, from that negative, which are circulated, taken off and distributed? A. Yes, sir.

Q. Now, then, you spoke about taking a number of scenes, one scene, an interior. Suppose this court room was supposed to be a scene—say you put in five or six different parts, or a picture of three reels. You would take, would you not, the various incidents required through those three reels at one time in this room? A. At one time, yes, sir.

Q. Now then, when the picture you have is ready for general development for the negative, what would you do with those three or four or five different scenes of this picture? A. They are all developed together, provided they are not too long. And after the development and drying and completing when the picture is completed we just get those scenes and number them at the time before the camera. If we have a scene No. 1 here for this picture, when it is taken we hold up a card with No. 1 on that. Then we take up the next scene, whatever the number is, we hold up 356 the card that is.

Q. You mean you hold it before you, before the camera? A. Yes, sir; before the camera. It is to take care of the film; but when the film is complete, we separate those and put them in continuity.

Q. How long do these rehearsals ordinarily take place for a picture of three reels? A. Well, they vary a great deal. A three-reel picture will average from two to three weeks sometimes; four weeks. It all depends—

357 Q. With the rehearsing, do you start right in? A. No, sir; we rehearse each part that we take up; after every picture is customed and cast, etc., and our first scene is set up, we call our people and those people who take part in the scene, we call them on the stage and rehearse that part; and we may rehearse for maybe half an hour, or an hour. It all depends upon how active they are in taking it up. Sometimes we only rehearse them two, and sometimes maybe only a couple of times. As soon as we find it is running smooth; and we can give them some start, we give them the lights and go to the camera.

Q. By giving the lights and going to the camera, you mean the picture is ready to be photographed by the camera? A. Yes, sir.

Q. For that particular scene? A. That is right.

Q. Your company made a picture of "Monte Cristo" with the consent of Mr. O'Neill? A. Yes, sir.

Q. How many reels did you have? A. I believe ours is in five reels, if I am not mistaken.

359 Q. How long did that take to manufacture? A. I believe we held that for four weeks.

Q. And during that four weeks, that including the rehearsing and drilling of the people? A. Yes, sir.

Q. And their performance before the camera, the taking of the picture and developing of the negative? A. Yes, sir.

In answer to Mr. Burkan—Cross-examination:

Q. In selecting your scenes, you select such scenes as are dramatically effective, do you not?

A. We do.

360 Q. You discuss a great many scenes, and take only such as are suitable for motion pictures? A. Dramatic, certainly.

Q. But what you are after mostly are effects? A. In some cases. Take well-known people, that people are familiar with, certain sets, while they may not just fit right in for motion pictures, give some effect, but inasmuch as everybody has seen those people who are identified with it—that scene is identified with those people, and in many cases we will sacrifice some effect to use that scene that is well-known, and that situation.

Q. But generally you are after the dramatically spectacular effect? A. It depends upon what it may be. If it is an original scenario or well-known people, yes. But take a play that is well known, we try to give that to the people, as having been there. There are certain things in a play that are dramatic, and they look for it, and we try to provide those things.

Q. And when you made the "Monte Cristo" in which Mr. O'Neill and this company appeared, you sacrificed spectacular effects, and simply reproduced everything that appeared in this play? 362 A. Oh, no, we did not.

Q. Why did you make the sacrifice you speak of in this particular instance? A. We picked out what we thought the most effective scenes and situations in Mr. O'Neill's play.

Q. And you were willing to sacrifice some parts? A. Yes, sir, sacrifice some parts. I admit that.

Q. So that your rule does not apply? A. I do not say we sacrificed them. We just eliminated them, probably thought another situation would be better for our purpose. 363

Q. You don't want his Honor to understand that you gave out the parts, to Mr. O'Neill and his actors, and you had them read all the lines, and the whole business for this picture? A. Not all the lines, but certain lines we thought could awake a certain emotion or effect.

In answer to the Court: Q. I understood you to say that after you received this manuscript, you gave out the parts to the players? A. Yes, sir; that is just the business. We read over a brief synopsis just the general business; general des-

cription of that. We did not give it to them with the view of studying the lines, because there are very few lines; but just to get familiar with the character of the part; so that you could study it and study the situation he depicted.

Q. You would have somebody read what you would want specially? A. Yes, sir; taken from the manuscript, and have the scenery set in the part, too.

Q. A description of the various scenes? A. A description of the various scenes.

365 Q. And the business that was to be done? A. Yes, sir.

Q. And the striking utterances that appeared in it? A. Yes, sir.

Q. And that is why nobody had to do with it unless he was taking a prominent part? A. A prominent part yes, sir; those are, no doubt, supernumeraries for those parts.

In answer to Mr. Gerber: Q. By the director's act, was it? A. Yes, sir; by the director's act.

366 Q. Depending upon the man who is taking the picture? One director has one system of training his artists, and another has another system? A. Yes, sir.

Q. So that there is no general rule on that? A. No, sir, there is no general rule on that; no fixed rule.

Q. When you took the picture of Mr. O'Neill and his company, you made a substantially accurate reproduction of his play, did you not, of "Monte Cristo"? A. No, I claim it is far from being an accurate reproduction.

Q. You just took particular scenes and occurrences, and particular situations, and particular climaxes? A. Yes, sir; absolutely.

Q. Did you take in those instances which you were supposed to take, Mr. O'Neill's people? A. Yes, sir.

Q. There is no question about that? A. There is no question about that.

Q. You wrote out a description of this play, did you not; you and Mr. Goulden? A. A description of the play?

Q. Yes. A. We adapted the scenery from his 368 play, yes, sir.

Q. That is, you took Mr. O'Neill's talk and his manuscript? A. Yes, sir.

Q. You and Mr. Goulden sat down and prepared what is known in your business as a scenario? A. Yes, sir.

Q. That is a description or synopsis of your picture? A. Yes, sir.

Q. And then you prepared the directions that were used in the making of the picture; that is; in arranging for the business of the artists and setting and so on? A. That is true.

Q. And after you had completed your work, 369 you copyrighted, did you not, your description and your pictures? A. Yes.

Q. Please look at this paper and tell me whether this is not a true story of this description that you prepared I am referring to Defendant's Exhibit 4. (Paper shown witness.)

The Court: How does it matter?

Q. You did copyright that description? A. Yes, sir; we did copyright that description.

Q. You sent two copies—A. No, I won't say that we copyrighted the description. We copy-

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righted the film. I don't know whether the description was—

Q. This is from the Copyright Office. A. Then it must be right.

Q. They say you did? A. Then there is no question about it.

Q. You sent to the copyright Office a description of those pictures that you—

The Court: You have it in evidence already.

(The following witness is called out of order.)

STELLA L. COLLYER, a witness called on behalf of the defendant, being duly sworn, testified as follows:

In answer to Mr. Burkan direct-examination:

Q. Where do you live? A. Baldwin, Long Island.

Q. And what business are you engaged in? A. I am a translator and stenographer.

Q. Do you speak French? A. I speak French.

Q. Do you read and write French? A. Yes, sir.

Q. Where are you employed? A. By Z. & L. Rosenfield.

Q. Their business is what? A. Stenography and typewriting.

Q. Do they do a translating business? A. Yes, sir.

Q. Did you make a translation of Dumas' "Monte Cristo" from the French into the

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English? A. Yes, sir; from the French into the English.

Q. Did you make it for me? A. I made it for Mr. Nathan Burkan.

Q. And did I deliver to you, or cause to be delivered to you, and furnish Dumas' dramatization of the Count of Monte Cristo in the French language? A. Yes, sir.

Q. Did you make a true and accurate translation of that work? A. Absolutely true and accurate.

Q. Is this your work that you have before you now? (indicating) A. Yes, sir; it is. 374

Q. And the three volumes which have been produced and marked Defendant's Exhibit 7, is a true and accurate translation of Dumas' dramatization in the French language of the "Count of Monte Cristo"? A. Yes, sir.

In answer to Mr. Gerber, cross-examination:

Q. Were you born in this country? A. Oh, yes, sir.

Q. And you have always lived in this country, haven't you? A. Always, except while I was away at school.

Q. Where did you study? A. In Montreal in a convent. 375

Q. Do you converse in French fluently? A. Well I am a little out of practice in conversational French.

Q. Do you do writing in French? A. A great deal; most exclusively.

Q. That is, writing French? A. Yes, sir.

Q. You are not a writer of any books, or anything, in French, are you? A. No, sir.

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Q. Have you done much translating in French outside of this particular work? A. I have translated almost constantly for the past three years.

Q. Of French into English? A. Yes, sir.

Q. With the Misses Rosenfield? A. For the Rosenfields; almost all French plays that have been produced in English I have translated in the last three years.

Adjourned until tomorrow morning,
March 16, 1915, 10:30 a. m.

New York, March 16, 1915.

All parties present. Case continued.

Mr. Gerber: The plaintiff rests.

(Plaintiff here rested.)

Mr. Burkan: I move to dismiss the complaint on the ground that no cause of action has been established; on the ground that the plaintiff has failed to establish any title to this play of "Count of Monte Cristo". On the ground that the plaintiff if he has had any title, has divested himself of all the common law rights and property therein, by depicting particular scenes and incidents and scenes of his play in pictorial posters which were posted on bill boards and other public places throughout the country without any restriction.

Upon the ground that this court has no jurisdiction because it affirmatively appears that the plaintiff has reproduced in motion pictures this play, and this picture has been copyrighted, and there has been offered in evidence a copyright certificate issued by the registrar of the Copyright

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Office, showing that this motion picture play adapted to reproduce this play of "Monte Cristo," has been copyrighted and published.

Upon the ground that the common law right in the so-called play, the Fechter version of the play, or the play claimed to be owned by him before the commencement of this action, has expired by limitation, because if this play had been copyrighted by the author thereof, the term of the copyright would have expired in 1898, and under no law can the plaintiff utilize any play, or any work, the subject of copyright, for any term beyond that authorized by the Copyright Law. In fact, he is seeking to extend to perpetuity the term of this literary work, which under no law is he entitled to, and I move to dismiss upon each and every ground.

The Court: I will reserve decision.

Mr. Burkan: I desire to read in evidence the deposition of certain witnesses pursuant to a commission issued out of this Court in this action. I offer now to read the deposition of Herbert Trendell, who appeared before the United States Consul at London, on the 5th of August, 1913.

HERBERT TREDELL of Ambassadors' Court, St. James' Palace, London, Chief Clerk in the Lord Chamberlain's Office, aged forty-nine years and upwards, being duly and publicly sworn pursuant to the directions hereto annexed, and examined on the part of the defendants doth depose and say as follows:

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First Interrogatory: What is your name, residence and occupation?

To the first interrogatory he saith: Herbert Trendell, M. V. O.; Ambassadors' Court, St. James Palace; Chief Clerk in the Lord Chamberlain's Office.

Second Interrogatory: Do you hold any public office under the Royal House or Laws of Great Britain? If so, what office do you hold?

383 To the second interrogatory he saith: The Lord Chamberlain's Office is one of the Departments of the King's Household, and I am therefore in the King's Household.

Third Interrogatory: If you shall have stated that you hold the office of Chief Clerk of the Lord Chamberlain's Office of Great Britain, how long have you held that office?

To the third interrogatory he saith: I have been in the Department for about sixteen years and have been Chief Clerk for about nine yaers.

384 Fourth Interrogatory: If you shall have stated that you hold the office of Chief Clerk of the Lord Chamberlain's Office, what are your duties as such officer?

To the fourth interrogatory he saith: I am in charge of all the official work under the Lord Chamberlain.

Fifth Interrogatory: What records, papers, documents and files are under your charge and control as such officer, in a general way?

To the fifth interrogatory he saith: All papers with reference to licensed plays and any official papers that go through the Department in connection with the Royal Household work.

Sixth Interrogatory: State whether or not you

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examined the records and files of said office for the purpose of ascertaining whether a drama or play entitled "Monte Cristo" is on file in said office?

To the sixth interrogatory he saith: I did.

Seventh Interrogatory: If you shall have stated that you have examined the records and files of said Office, and have found the drama or play entitled "Monte Cristo" on file there, state whether the same is printed or written, and when the same was filed or recorded in said Office.

To the seventh interrogatory he saith: It is 386 printed in the form of a book and published. It was filed on the 17th October, 1868.

Mr. Gerber: I do not object to any part of the answer, but they ask with reference to this Fechter production, and the rest of the question is: "State whether the same is printed or written, and when the same was filed or recorded in said office." This part of his answer: "It is printed in the form of a book." What I object to is the words "and published".

The Court: What is the rest of the answer? 387

Mr. Gerber: "It was filed on the 17th of October, 1868." I do not object to any words, except the words "and published".

Objection sustained, and exception.

Mr. Burkan: Your Honor allows the words "It is printed in the form of a book, filed on the 17th of October, 1868," and you exclude the words "and published", to which I except.

Eighth Interrogatory: If you shall have stated

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that you found the drama or play entitled "Monte Cristo" on file, or record in said Office, do you now produce a true copy thereof?

To the eighth interrogatory he saith: Yes.

Ninth Interrogatory: If you shall have stated that you found the drama or play "Monte Cristo" on file, or record, in said office, and that you now produce a true copy thereof, annex such copy to your deposition.

To the ninth interrogatory he saith: I do so.

389 Copy produced by witness; marked "Exhibit H. T. 1"; signed by witness and commissioner and formally put in evidence.

Tenth Interrogatory: If you shall have stated that you found the drama or play "Monte Cristo" on file, or record in said Office, do the files or records of said Office show who caused the same to be filed or recorded? If they do, state what such files or records show in that respect?

390 To the tenth interrogatory he saith: That is rather difficult. The Lord Chamberlain licenses plays to the Manager of a certain Theatre and we never note in our registers any person in particular. The Manager of the Theatre is always held responsible for a new play being produced. The license is sent to him and after the first night of its production the producer of a new play has the right to ask the Manager for that license.

Eleventh Interrogatory: If you shall have stated that you found the drama or play "Monte Cristo" on file, or record in said Office, do you know who caused the same to be so filed or recorded? If you do know, give the name of the person or persons who caused the same to be so filed or recorded.

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To the eleventh interrogatory he saith: All I can say is that on the original copy there is the name written of Mr. Benjamin Webster, Theatre Royal, Adelphi Strand, and it has also written on it "Licenser's copy."

Twelfth Interrogatory: If you shall have stated that you found the drama or play "Monte Cristo" on file, or record in said Office, state whether the same was so filed in pursuance of any law or statute, and if so state under what law or statute?

To the twelfth interrogatory he saith: I pro- 392
duce and annex to my deposition a copy of the statute under which the Lord Chamberlain receives plays for licensing.

Copy Statute produced by witness; marked "Exhibit H. T. 2"; signed by witness and commissioner and formally put in evidence.

Thirteenth Interrogatory: If you shall have stated that you found the drama or play "Monte Cristo" on file, or record in said Office, do you know whether a preliminary permit and a license to produce said play were ever granted to any person or persons, company, corporation or asso- 393
ciation?

To the thirteenth interrogatory he saith: It is impossible to say. We should only have a register of the license actually issued.

Fourteenth Interrogatory: If you shall have stated that a preliminary permit and a license to produce said drama or play "Monte Cristo" were issued or granted, state to whom said license and permit were granted, and by whom, and by what authority and in pursuance of what law or statute

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the same were granted and when each of the same was granted.

To the fourteenth interrogatory he saith: That has been practically covered by my other answers. There was no preliminary permit as far as I can find by the records. At that date a play could not be produced on any permit without an actual license. Now we do grant permits, but we did not then.

395 Fifteenth Interrogatory: If you shall have stated that you found on file or record in said Office a preliminary permit and a license to produce the drama or play "Monte Cristo", do you now produce true copies of such license and permit?

To the fifteenth interrogatory he saith: I cannot produce a copy of the license as it was not kept. I produce and annex to my deposition a form of license.

Form of license produced; marked "Exhibit H. T. 3"; signed by witness and commissioner and formally put in evidence.

396 Sixteenth Interrogatory: If you shall have stated that you produce true copies of such license and permit to produce the drama or play "Monte Cristo", annex the same to your deposition.

To the sixteenth interrogatory he saith: I have just produced and annexed to my deposition a form of license.

Seventeenth Interrogatory: State whether or not the files or records of said Office show when said drama or play "Monte Cristo" was first publicly represented in Great Britain, and if so, state what such files or records show in that respect.

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To the seventeenth interrogatory he saith: The files show that it was sent in to the Lord Chamberlain's office to be read on the 17th October, 1868, it was read on October 17th or 18th and license sent on the 19th.

Eighteenth Interrogatory: Do you know of any other matter or thing in relation to the matters in difference in this action which might benefit the defendant therein? If you do, state the same as fully and at large as if you had been particularly interrogated in respect to the same.

To the eighteenth interrogatory he saith: No. 398
The Lord Chamberlain has nothing whatever to do personally with the owner of a play, but only with the manager who produces it and receives the license.

CROSS-INTERROGATORIES:

First Cross-interrogatory: If, in answer to the sixth interrogatory, you state that you have examined the records and files of your office, for the purpose of ascertaining whether a drama or play is on file in your office, state when and by whom the request to make such examination was made, and if the request was made in writing, annex copies of said written request; if you sent any answer to said request, please annex copies of the answers you sent. 399

To the first cross-interrogatory he saith: The request was made by Messrs. Strong, Buckmaster & Bolden, Solicitors, on the 15th March, 1913, and we sent them the copy on the 26th. I produce and annex copy of their written request. We should send no answer; simply "with the Lord Chamberlain's compliments."

Copy of request produced by witness; marked "Exhibit H. T. 4"; signed by witness and commissioner and formally put in evidence.

Second Cross-interrogatory: State whether you personally examined the records and files of your office for the purpose of ascertaining whether a play or drama entitled "Monte Cristo" was on file in your office, and when such examination was made, and if you did not make such examination in person, state the name of the person who made such examination.

To the second cross-interrogatory he saith: I made the examination and found that this original copy was bound up amongst other copies on record and that would be of course directly I had the request on the 15th March.

Third Cross-interrogatory: If, in answer to the seventh interrogatory, you state that you have found the play or drama entitled "Monte Cristo" on file in your office, state whether your knowledge of such filing is derived from the records in your office, and whether you have any personal knowledge as to when and by whom such drama or play was filed.

To the third cross-interrogatory he saith: No, I have no personal knowledge. It is entirely from what we have on record.

Fourth Cross-interrogatory: If, in answer to the eighth interrogatory, you produce a true copy of the play or drama entitled "Monte Cristo" which is on file in your office, state whether you have compared said copy with the original on file, and if you did not yourself compare it, state the name of the person who compared the same, and how the comparison was made.

To the fourth cross-interrogatory he saith: I compared it generally myself and found it coincided exactly.

Fifth Cross-interrogatory: If you annex a copy of the play, kindly include the title page, and each page preceding the title page, and all that follows the title page.

To the fifth cross-interrogatory he saith: The copy already produced is an exact copy of the book.

Sixth Cross-interrogatory: If you answer the tenth interrogatory, state how you know of your own knowledge who caused the said play to be filed.

To the sixth cross-interrogatory he saith: I do not know of my own knowledge; I can only say that Mr. Webster's name is written on the copy on record.

Seventh Cross-interrogatory: Is it not the purpose of submitting a play to the Lord Chamberlain to secure the right or license to give a performance thereof?

To the seventh cross-interrogatory he saith: Yes.

Eighth Cross-interrogatory: Is it not necessary that every play be submitted to the Lord Chamberlain before production, in order to obtain his license or permission to give a production in England?

To the eighth cross-interrogatory he saith: Yes.

Ninth Cross-interrogatory: Is not the purpose of submitting a play prior to performance to the Lord Chamberlain, to have him censor the play and pass upon the propriety of a public performance thereof?

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To the ninth cross-interrogatory he saith:
Yes.

Tenth Cross-interrogatory: May not a play be submitted by the author, proprietor, manager or producer, or any other person who may be interested in the production of a play, intending to give, or cause to be given, a public performance?

407 To the tenth cross-interrogatory he saith: A play should be sent to the Lord Chamberlain by the Manager of the Theatre where it is to be produced. If it is sent us by the author or the proprietor he has to name the Theatre where it is to be produced and the date.

Eleventh Cross-interrogatory: Has a stranger, without the permission of the applicant for a license, or licensee, a right to remove or use plays submitted to the Lord Chamberlain for his censorship?

To the eleventh cross-interrogatory he saith:
No, certainly not.

408 Twelfth Cross-interrogatory: If, in answer to the thirteenth interrogatory, you state that you know that a preliminary permit or license to produce said play was granted, state how and in what manner you derived said information, and whether the same is your own personal knowledge, or whether the same was derived from documents in your office.

To the twelfth cross-interrogatory he saith:
From the documents on record in the office.

Thirteenth Cross-Interrogatory: If, in answer to the fifteenth interrogatory, you produce true copies of said license and permit, state whether you yourself personally compared said copies with the original, or whether they were compared

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by some other person, and if compared by some other person, kindly give the name of such other person.

To the thirteenth-cross interrogatory he saith:
I am not producing a copy of the said license.

Fourteenth Cross-interrogatory: If, in answer to the seventeenth interrogatory, you state when the said drama or play "Monte Cristo" was first performed in Great Britain, state whether you know this of your own personal knowledge, or whether the same is derived from the files and records in your office.

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To the fourteenth cross-interrogatory he saith:
Simply from the files and records in the office.

Mr. Burkan: I offer in evidence a copy of the play which was offered in evidence before the commissioner.

Received and marked Exhibit 20.
(Reading continued.)

Mr. Burkan: I will offer in evidence Chapter 68 of the sixth and seventh Victoria, 12th and 13th sections attached to the commission.

Received and marked Exhibit 21.

Mr. Burkan: Also I offer the form of 411
license.

Received and marked Exhibit 22.

Mr. Burkan: I offer in evidence from the statute at large Vol. 82, 5 and 6 Victoria, taken from the Law Institute Library, the recognized library of law literature of the City of New York, and I offer in evidence Chapter 45, Section 2 and Section 20 of the same chapter; for the purpose of showing that under the English Law the giving

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of performances in England were equivalent to copyright, and this is also publication under the English law, and the term of the copyright is for the term of forty-two years.

Mr. Gerber: I have no objection to the whole of the act going in, because it is entirely immaterial to this case.

Received in evidence.

Mr. Burkan: I also offer to read in evidence the deposition of Julius Victor Scholderer, taken under commission.

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JULIUS VICTOR SCHOLDERER, of No. 2 Courthope Road, Wimbledon; aged thirty-three years and upwards; Assistant in the Department of Printed Books, British Museum; being duly and publicly sworn pursuant to the directions hereto annexed, and examined on the part of the defendants doth depose and say as follows:

First Interrogatory: What is your name, residence and occupation?

414 To the first interrogatory he saith: Julius Victor Scholderer; No. 2 Courthope Road, Wimbledon; Assistant in the Department of Printed Books, British Museum.

Second Interrogatory: If you shall have stated that you are connected with the British Museum, England, state what such connection is?

To the second interrogatory he saith: As I say, I am Assistant in the Department of Printed Books.

Third Interrogatory: If you shall have stated that you are in charge of the old newspapers on file in the British Museum, state whether or not

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you have examined the files of newspapers in the British Museum, for the purpose of ascertaining whether any issues of the newspapers known as "Daily Telegraph", "The Times" and "Morning Advertiser" were on file therein, containing an account or review of the public performance in London, England, of the drama or play "Monte Cristo" in the month of October, 1868?

To the third interrogatory he saith: I have examined the issues of newspapers and found copies of the papers mentioned in the interrogatory on file there. As to a review of the performance 416 I do not know anything.

Fourth Interrogatory: If you shall have stated that you found on file in the British Museum, issues of said newspapers containing accounts or reviews of the public performance at the Adelphi Theatre in London of the drama or play "Monte Cristo" in the month of October, 1868, state the date of issue of each of said such papers.

To the fourth interrogatory he saith: The "Daily Telegraph" dated October 19th, 1868; "The Times" dated October 19th, 1868, and the "Morning Advertiser" dated October 19th, 1868.

417 Fifth Interrogatory: If you shall have stated that you found on file in the British Museum an issue of the "Daily Telegraph" an issue of "The Times", and an issue of the "Morning Advertiser", each dated October 19th, 1868, and each containing a review or account of the public performance in London, England, of the drama "Monte Cristo", do you now produce each of said issues of said newspapers and identify the said issue of the "Daily Telegraph" as Defendant's Exhibit 1 for identification, the said issue of

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"The Times" as Defendant's Exhibit 2 for identification, and the said issue of the "Morning Advertiser" as Defendant's Exhibit 3 for identification?

To the fifth interrogatory he saith: Yes. I produce for identification the copies of the said newspapers on file; but am unable to offer additional copies as exhibits to my testimony to this Commission, the copies produced for identification being the only copies under my charge and belonging to the British Museum.

419 Sixth Interrogatory: Were the said issues of said newspapers, the "Daily Telegraph", "The Times" and "Morning Advertiser", dated October 19th, 1868, filed in the British Museum, in pursuance of any statute, and if so, state under what statute and under what statutory provisions the same were filed.

To the sixth interrogatory he saith: They were originally filed at Somerset House apparently, but they were afterwards taken over by the British Museum on the abolition of the Stamp Act in 1869. They were filed at Somerset House I think as evidence of the payment of Stamp
420 Duty.

Seventh Interrogatory: State whether the records of the British Museum show the dates when the issues of said newspapers "Daily Telegraph", "The Times" and "Morning Advertiser", dated October 19th, 1868, were filed in the British Museum and if the dates are shown, state the date of the filing of each of said issues.

To the seventh interrogatory he saith: I cannot state anything precise as to that, only the newspapers that were at Somerset House appear to

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have been transferred to the British Museum in the years 1870 and 1871, and presumably these newspapers would be part of those batches that were sent over. Apparently nothing more precise as to the exact transference of any particular newspaper is on record. There is a rubber stamp impression on the copy of the "Daily Telegraph" which reads as follows: "I. R. Newspaper Regy. Received 27th November, 1868" and in ink is written "Joseph Ellis, 135 Fleet Street, E. C." who at that time was the printer and publisher; 422 a similar stamp on the copy of "The Times" "I. R. Newspaper Regy. Received 18th November, 1868" with again in ink "F. Goodlake, Printer and Publisher, Printing House Square, Blackfriars"; a similar stamp on the copy of the "Morning Advertiser" "I. R. Newspaper Regy. Received 27th, October, 1868" and written in ink "Printer, William Burdett Cowdroy. Thomas Bamford, Publisher, 127 Fleet Street."

Eighth Interrogatory: State how long to your knowledge the said issues of said newspapers, "Daily Telegraph", "The Times" and "Morning
423 Advertiser" have been on file in the British Museum and state the source of your knowledge.

To the eighth interrogatory he saith: They have been on file presumably ever since they came, in presumably 1870 or 1871. I have been shown some manuscript records in the copyright office where these things are kept on which this information about the Stamp Act is based. Also I have looked at the printed Report of the Museum for 1872.

Ninth Interrogatory: What is the British Museum?

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To the ninth interrogatory he saith: It is an Institution established by Parliament, one part of which is set apart for the reception of a copy of every book and newspaper published in Great Britain under the Copyright Act of 1842.

425 Tenth Interrogatory: If you shall have stated that the British Museum is or includes a public library, state whether the same has been since prior to the year 1868 established, and is and since prior to the year 1868 has been open to the general public, and is and has since said time been extensively visited and used by a large number of people daily, and whether all newspapers on file therein were open to the use of the general public, and were so used.

426 To the tenth interrogatory he saith: Only holders of tickets issued by the Museum Authorities are allowed to use the Reading Room, and if you take the general public as everybody who has such a ticket then that is so. This has been established since prior to the year 1868, and subject to the above qualification has been open to the general public and has since that time been extensively visited and used by a large number of people daily. All newspapers on file therein are open to the use of such public. I annex a copy of the Rules governing such user.

Copy Rules produced by witness; marked "Exhibit J. V. S. 1 & 1a"; signed by witness and commissioner and formally put in evidence.

Eleventh Interrogatory: State since when each of said newspapers "Daily Telegraph", "The Times", and "Morning Advertiser", dated October 19th, 1868, on file in the British Museum, has been open to the use of the public.

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To the eleventh interrogatory he saith: I should presume since 1870 or 1871 when such newspapers appear to have been transferred from Somerset House to the British Museum, as referred to in my answer to the seventh interrogatory.

Twelfth Interrogatory: Do you know of any other matter or thing in relation to the matters in difference between the parties to this action, which may benefit the defendant therein? If you do, state the same as fully and at large as if you had been particularly interrogated with respect 428 to the same.

To the twelfth interrogatory he saith: No.

First Cross-interrogatory: If you shall state that you have examined the files and newspapers of the British Museum, for the purpose of ascertaining whether any issues of the newspapers known as "The Daily Telegraph", "The Times" and "The Morning Advertiser", were on file, containing an account or review of the public performance in London, England, of the drama or play "MONTE CRISTO" in the month of October, 1868, kindly state whether you were at any time 429 prior to the time when you were examined under the annexed commission, requested to make an examination of the said newspapers, and if such request was made in writing, annex the written request, or a true copy thereof, and if you sent any written communication in answer to said request, annex a copy of your answer. If the request was made to you orally, state as fully as you can when and by whom the said oral request was made.

To the first cross-interrogatory he saith: Yes,

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I annex a copy of the Order for Examination, under which I appear here.

Copy Order produced by witness; marked "Exhibit J. V. S. 2"; signed by witness and commissioner and formally put in evidence.

431 Second Cross-interrogatory: State whether you have any personal knowledge of the truth of the reviews or accounts of the public performance in London, England, of the drama "MONTE CRISTO", contained in defendant's Exhibits 1, 2 and 3 for identification.

To the second cross-interrogatory he saith: No, I have not any.

Third Cross-interrogatory: State how long you have been director and chief librarian of the British Museum?

To the third cross interrogatory he saith: I have never been Director and Chief Librarian of the British Museum; but I was directed by him to attend in his place.

432 Fourth Cross-interrogatory: In respect of the newspapers, to which your attention has been directed, have you any further personal knowledge than the fact that you found them on file in the British Museum?

To the fourth cross-interrogatory he saith: No, I have not.

Fifth Cross-interrogatory: Kindly state whether you are a solicitor or barrister, admitted to practice.

To the fifth cross-interrogatory he saith: No, I am not.

The Court: What are you offering this deposition for?

Argument

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Mr. Burkan: For the purpose of showing that in these newspapers there was contained in each of them a narrative showing all the incidents, all the scenes and all the situations narrated at length in those newspapers, and which this plaintiff in this suit claims we have pirated. He bases his action upon the fact that in 1870 a Mr. Fechter arranged and made a version from the French. And we propose to show that two years previous to that this was public property; all those scenes and all those 434 situations and all this property he claims he has acquired by virtue of his transfer from Cheney, for the purpose of showing it was published two years before. It has the same force and effect as the Dumas dramatization and the Lacy version. Shows the source. It shows that in 1870 this play which this man calls his property was public property in 1868.

The Court: It is conceded, is it not, that this 1868 version was produced on the stage in London?

Mr. Gerber: Yes, sir.

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The Court: That the performances were public performances?

Mr. Gerber: Yes, sir.

Mr. Burkan: Were portrayed.

The Court: Yes, were portrayed.

Mr. Gerber: Yes, sir.

The Court: I will exclude the criticisms, the dramatic criticisms. You may offer the rest of the deposition.

Mr. Burkan: Yes, sir; and I will also offer the plaintiff's deposition of Julius Victor Scholderer, the deposition and cross-interrogatories of the witness, and the deposition of Marian Baker.

437 MARIAN BAKER of 6 Mandrake Road, Upper Tooting; Head Cashier of the Woolworth Company, Wimbledon; aged thirty-one years and upwards, being duly and publicly sworn pursuant to the direction hereto annexed, and examined on the part of the defendants doth depose and say as follows:

First Interrogatory: What is your name, residence and occupation?

To the first interrogatory she saith: Marian Baker; 6 Mandrake Road, Upper Tooting; Head Cashier of the Woolworth Company, Wimbledon.

438 Second Interrogatory: State whether you attended at the British Museum in the County of London, England, for the purpose of searching for newspapers containing reviews of the play "Monte Cristo", and if so, state the days on which you so attended and what the result of your search was?

To the second interrogatory she saith: I attended the British Museum on the 20th and 22d March, 1913. The result of my search was that I found the reviews for which I was looking.

Third Interrogatory: If you state that on the days named by you you found an issue of the newspaper known as "The Times," dated Octo-

ber 19th, 1868, containing a review of the said play "Monte Cristo", state whether you carefully examined said issue of said newspaper?

To the third interrogatory she saith: I only looked at the paper as far as finding the review. I did not carefully examine the paper itself.

Fourth Interrogatory: If you state that you have carefully examined said issue of said newspaper "The Times" describe in detail the said issue of said newspaper, its title, any drawing, words, dates, figures, letters or marks appearing at the head of the front page or any distinguishing marks or features appearing on any part of said issue of said newspaper. 440

To the fourth interrogatory she saith: I found the volume of the paper I wanted. I did not notice any particular marks on it. I noticed that the paper was headed "The Times" and that the date was October 19th, 1868.

Fifth Interrogatory: State whether said issue of said newspaper "The Times" was bound together with other papers in one volume, and if so, whether you carefully examined said volume of which the said issue of "The Times" was a part? 441

To the fifth interrogatory she saith? The said issue of "The Times" was bound together with other issues of the same paper in one volume. I only examined such volume insofar as I wanted to find the review of "Monte Cristo" which is in the issue of the 19th October, 1868.

Sixth Interrogatory: If you state that you have carefully examined said volume of which said issue of "The Times" as a part, describe in detail said volume and any title, lettering or dis-

tinguishing mark or feature appearing on said volume.

To the sixth interrogatory she saith: The volume is bound in leather and on the back in gilt lettering is: "The Times" and "October, 1868".

Seventh Interrogatory: State whether you copied any part of or article contained in said issue of "The Times" and if so, state of which article you made a copy.

To the seventh interrogatory she saith: Yes, I made a copy of the article entitled "Adelphi Theatre."

Eighth Interrogatory: If you state that you made a copy of that part of said issue of "The Times" containing an account or review of the public performance of the drama "Monte Cristo", produce said copy and state whether the copy so made and now produced is a true copy of the review or account of the public performance of said drama "Monte Cristo" contained in said issue of "The Times".

To the eighth interrogatory she saith: Yes, I produce said copy which is a true copy of the review or account of the public performance of the said drama "Monte Cristo" contained in said issue of "The Times".

Ninth Interrogatory: If you state that the copy produced by you is a true copy of the review of the performance of said drama "Monte Cristo" contained in said issue of said newspaper "The Times," mark the said copy Defendant's Exhibit 4, and annex the said copy so marked to this deposition.

To the ninth interrogatory she saith: I annex the said copy marked "Defendant's Exhibit 4."

Copy review produced by witness; marked "Defendant's Exhibit 4"; signed by witness and commissioner and formally put in evidence.

Tenth Interrogatory: If you state that on the days named by you you found an issue of the newspaper known as "Daily Telegraph", dated October 19th, 1868, containing a review of the said play "Monte Cristo", state whether you carefully examined said issue of said newspaper?

To the tenth interrogatory she saith: Yes, I examined it in order to find the review of "Monte Cristo".

Eleventh Interrogatory: If you state that you have carefully examined said issue of said newspaper "Daily Telegraph", describe in detail the said issue of said newspaper, its title, any drawing, words, dates, figures, letters or marks appearing at the head of the front page or any distinguishing marks or features appearing on any part of said newspaper.

To the eleventh interrogatory she saith: I examined the issue of the "Daily Telegraph" dated October 19th, 1868. The title "The Daily Telegraph" appeared on the front page, and I noticed the date, October 19th, 1868.

Twelfth Interrogatory: State whether said issue of said newspaper "Daily Telegraph" was bound together with other papers in one volume, and if so, whether you carefully examined said volume of which said issue of "Daily Telegraph" was a part?

To the twelfth interrogatory she saith: Yes, the copy referred to dated October 19th, 1868, was bound up with other issues of the "Daily Telegraph."

Thirteenth Interrogatory: If you state that you have carefully examined said volume of which said issue of "Daily Telegraph" is a part, describe in detail said volume and any title, lettering or distinguishing mark or feature appearing on said volume.

To the thirteenth interrogatory she saith: The said volume was bound in a leather cover with the words in gilt lettering "The Daily Telegraph" and "October to December, 1868".

449 Fourteenth Interrogatory: State whether you copied any part of or article contained in said volume of "Daily Telegraph", and if so, state of which article you made a copy.

To the fourteenth interrogatory she saith: Yes, I made a copy of an article headed "Monte Cristo".

450 Fifteenth Interrogatory: If you state that you made a copy of that part of said issue of "Daily Telegraph" containing an account or review of the public performance of the drama "Monte Cristo", produce said copy and state whether the copy so made and now produced is a true copy of the review or account of the public performance of said drama "Monte Cristo" contained in said issue of "Daily Telegraph."

To the fifteenth interrogatory she saith: I am unable to produce the said copy because it was sent along with copies of the other articles to Mr. Burkan in New York, annexed to an affidavit sworn by myself before the American Vice and Deputy Consul General in London, and I did not retain a copy of it in typewriting as I did of the other two.

Sixteenth Interrogatory: If you state that the

copy produced by you is a true copy of the review of the performance of said drama "Monte Cristo" contained in said issue of said newspaper "Daily Telegraph", mark the said copy Defendant's Exhibit 5, and annex the said copy so marked to this deposition.

To the sixteenth interrogatory she saith: I am unable to annex the copy which I made of the said article.

Seventeenth Interrogatory: If you state that on the days named by you you found an issue of the newspaper known as "Morning Advertiser", 452 dated October 19th, 1868, containing a review of the said play "Monte Cristo," state whether you carefully examined said issue of said newspaper?

To the seventeenth interrogatory she saith: Yes, I carefully examined it.

Eighteenth Interrogatory: If you state that you have carefully examined said issue of said newspaper "Morning Advertiser", described in detail the said issue of said newspaper, its title, any drawing, words, dates, figures, letters or marks appearing at the head of the front page or any distinguishing marks or features appearing 453 on any part of said newspaper.

To the eighteenth interrogatory she saith: The said issue was headed "The Morning Advertiser" and dated October 19th, 1868.

Nineteenth Interrogatory: State whether said issue of said newspaper "Morning Advertiser" was bound together with other papers in one volume, and if so, whether you carefully examined said volume of which said issue of "Morning Advertiser" was a part?

To the nineteenth interrogatory she saith: Yes,

it was bound together with other issues of the same paper in one volume and I carefully examined the said volume.

Twentieth Interrogatory: If you state that you have carefully examined said volume of which said issue of "Morning Advertiser" is a part, describe in detail said volume and any title, lettering or distinguishing mark or feature appearing on said volume.

To the twentieth interrogatory she saith: The said volume was bound in leather on which appeared in gilt lettering "Morning Advertiser" and "September to December, 1868."

Twenty-first Interrogatory: State whether you copied any part of or article contained in said issue of "Morning Advertiser", and if so, state of which article you made a copy.

To the twenty-first interrogatory she saith: Yes, I made a copy of the article headed "Adelphi Theatre."

Twenty-second Interrogatory: If you state that you made a copy of that part of said issue of the "Morning Advertiser" containing an account or review of the public performance of the drama "Monte Cristo", produce said copy and state whether the copy so made and now produced is a true copy of the review or account of the public performance of said drama "Monte Cristo" contained in said issue of "Morning Advertiser".

To the twenty-second interrogatory she saith: I produce the said copy, which is a true copy of the article headed "Adelphi Theatre" contained in the said issue of the "Morning Advertiser."

Twenty-third Interrogatory: If you state that

the copy produced by you is a true copy of the review of the performance of said drama "Monte Cristo" contained in said issue of said newspaper "Morning Advertiser" mark the said copy "Defendant's Exhibit 6", and annex the said copy so marked to this deposition.

To the twenty-third interrogatory she saith: I annex the said copy marked "Defendant's Exhibit 6."

Copy produced by witness; marked "Defendant's Exhibit 6"; signed by witness and commissioner and formally put in evidence. 458

Twenty-fourth Interrogatory: Were you present during the examination of Julius Victor Scholderer, a representative of the British Museum, as a witness in this action, under the annexed letters rogatory, on the eleventh day of November, 1913, and did you hear the testimony then given by said witness, and did you see the newspapers then produced by said witness?

To the twenty-fourth interrogatory she saith: Yes, I was present and I heard the testimony of Julius Victor Scholderer and I saw the newspapers then produced by him. 459

Twenty-fifth Interrogatory: Look at the issues of the newspapers "The Times", "Daily Telegraph" and "Morning Advertiser", all dated October 19th, 1868, referred to by said representative of the British Museum in his said testimony and produced by said witness, and state whether you have seen said issues of said newspapers before, and if so, when and where?

To the twenty-fifth interrogatory she saith: Yes, I saw all three of them on the 20th and 22d March, 1913, at the British Museum.

Twenty-sixth Interrogatory: If you state that you saw said issues of said newspapers in the British Museum on the 20th and 22d days of March, 1913, state whether said issues of said newspapers are the same as those described by you in answer to the interrogatories numbered 2 to 23, and the same in which you found the reviews of the public performance of the drama "Monte Cristo" referred to by you in your answers to the said interrogatories numbered 2 to 23, and marked by you Defendant's Exhibits 4, 5 and 6.

To the twenty-sixth interrogatory she saith: Yes.

Twenty-seventh Interrogatory: Do you know of any other matter or thing in relation to the matters in difference in this action which might benefit the defendant therein? If you do, state the same as fully and at large as if you had been particularly interrogated in respect to the same.

To the twenty-seventh interrogatory she saith: No.

CROSS-INTERROGATORIES:

First Cross-interrogatory: Have you seen a copy of the direct or cross-interrogatories, prior to your examination or that of any other witness? If, yea, who furnished them to you? If you state that you have not received copies, has anyone written to you, stating the substance of the interrogatories or cross-interrogatories to be propounded to you or that of any other witness? If so, from whom did you receive the communication, and annex the communication, if in writing. If oral, state what was said. Have you received

a copy of any interrogatories in this action? If so, from whom, and annex the interrogatories so received by you. Have you received any letter from any person, respecting the interrogatories to be administered to any of the witnesses on behalf of the defendant? If so, kindly annex the letter. Have you had any communication, verbal or oral, with any person, on the subject of your examination, or that of any of the witnesses on behalf of the defendant? If so, state when and with whom, and state the substance of the communication.

To the first cross-interrogatory she saith: Yes, Mr. Strong of Strong, Buckmaster & Bolden, Solicitors, sent me a copy of the interrogatories only. I have never seen a copy of the cross-interrogatories. I also received two letters from Mr. Strong asking me to be here, which I annex.

Letters produced by witness; marked "Exhibits M. B. 1 and 2" respectively; signed by witness and commissioner and formally put in evidence.

I also annex the copy of the interrogatories I received.

Copy interrogatories produced by witness; marked "Exhibit M. B. 3"; signed by witness and commissioner and formally put in evidence.

Otherwise then the two letters I received by post, I have not had any communication verbally or otherwise with any person on the subject of my examination or that of any other witness.

Second Cross-interrogatory: By whom were you employed to interest yourself in this case and secure evidence? When were you so employed, and

what have you received or been promised by way of compensation?

To the second cross-interrogatory she saith: I was employed by Mr. Charles Warren some time before the 20th March, 1913, to take down the reviews and type them. I forget, but I think I received thirty shillings. I have not been promised anything else.

Third Cross-interrogatory: Have you seen the witnesses who have been or about to be examined under the commission issued by the Supreme
467 Court of the State of New York? Have you had any conversation with them, respecting their attendance, and the testimony you expect them to give? If yea, was that part of your employment, and for which you received or expected to receive compensation?

To the third cross-interrogatory she saith: I have only seen the witness examined this morning, and Mr. Trendell who was examined on a prior occasion. I have not had any conversations with them respecting their attendance and their testimony or at all.

Fourth Cross-interrogatory: State whether
468 you personally know who wrote the review of said drama, which appeared in The Daily Telegraph of October 19, 1868, or The Times, of October 19, 1868, or The Morning Advertiser, of October 19, 1868.

To the fourth cross-interrogatory she saith: No, I do not know.

Fifth Cross-interrogatory: Have you been requested at any time by the defendant, the General Film Company, or any of its officers, or by its attorney, Nathan Burkan, of 165 Broadway, New

York City, Borough of Manhattan, or the Selig Polyscope Company, or anyone on its behalf or in its employ, to make any examination of any of the books or papers referred to in any of the direct-interrogatories, and if you have been so requested, and such requests were in writing, annex copies of such requests.

To the fifth cross-interrogatory she saith: No, I have not; but I was instructed by Mr. Charles Warren who I believe was agent for Mr. Nathan Burkan.

Sixth Cross-interrogatory: If you state that
470 you made a copy of a review of the performance of the drama "Monte Cristo" from the newspaper "The Times", state who assisted you in making the copy, or in the comparison, and how the comparison was made.

To the sixth cross-interrogatory she saith: Nobody assisted me, and no comparison has been made so far as I know.

Seventh Cross-interrogatory: If you state that you made a copy of a review of the performance of the drama "Monte Cristo" from the newspaper "The Daily Telegraph", state who assisted
471 you in making the copy, or in the comparison and how the comparison was made.

To the seventh cross-interrogatory she saith: Nobody has assisted me, and no comparison has been made so far as I know.

Eighth Cross-interrogatory: If you state that you made a copy of a review of the performance of the drama "Monte Cristo" from the newspaper "The Morning Advertiser", state who assisted you in making the copy, or in the comparison, and how the comparison was made.

To the eighth cross-interrogatory she saith: I went to the British Museum on the 22d March, and I made a copy in shorthand of the review in the "Morning Advertiser" which I afterwards typed out. Nobody assisted me in any way.

Received and marked Exhibit 23-a.

Mr. Burkan: Also I offer in evidence copies of the newspapers for the purpose as testified to by these witnesses Scholderer and Baker; copies of the Times of October 19, 1868; copies of the Daily Telegraph of October 19, 1868; also a copy of the Morning Advertiser, dated October 19, 1868, which has been marked for identification, all being Exhibit 8 for identification, which includes three papers as one exhibit.

Mr. Gerber: I object to that as incompetent, immaterial and irrelevant.

Objection sustained, and exception.

Mr. Burkan: There is no objection as to their being copies or anything like that?

Mr. Gerber: No, sir.

Mr. Burkan: There is no objection taken upon the ground that we have failed to prove that the copies I have offered here appear to be copies of the papers on file in this museum, and that there is on file in this museum the originals of those copies?

Mr. Gerber: I do not object that the accuracy of the copy has not been established.

CHARLES SCHWARTZ, a witness called on behalf of the defendant, being duly sworn, testified as follows:

In answer to Mr. Burkan—Direct-examination:

Q. Where do you reside? A. 1040 Simpson Street.

Q. You are a clerk in my office? A. Yes, sir.

Q. At my request did you compare the book you hold in your hand with Defendant's Exhibit 20 of this date? (Book shown witness.) A. I did.

Q. Is the book you hold in your hand a true and correct copy of the Defendant's Exhibit 20 of this date? A. It is, with the exception of one word on page 31, which is "impertinence" and should read "important;" page 56, Act III, last line after "Monsieur" there is a word "there." Act IV, page 6, second line "world" should read "word."

The Court: I will have to read this.

JOHN F. PRIBYL, a witness called on behalf of the defendant, being duly sworn, testified as follows:

In answer to Mr. Burkan—Direct-examination:

Q. Where do you reside? A. Wilmette, Illinois.

Q. What is your business? A. I am assistant president of the Selig Polyscope Company.

Q. The Selig Polyscope Company is a corporation organized under the laws of Illinois? A. Yes, sir.

Q. And what business are they in? A. They manufacture motion pictures.

Defendant's: John F. Pribyl—Direct

Q. And has been engaged in that business for a number of years? A. Yes, sir.

Q. Has the Selig Polyscope Company made many motion pictures? A. Yes, sir.

Q. And so-called feature films? A. Yes, sir.

Q. What is a feature film? A. A feature film is a multiple reel of exceptional importance or value.

Q. Has the Selig Polyscope Company reproduced motion pictures in those forms? A. Yes, sir.

479 Q. Will you name some? A. "The Spoiler," "The Two Orphans," "Cinderella," "Carpet from Bagdad," "Rosary," "Ne'er do Well," and a great many others.

Q. What is your usual practice in the making of a motion picture film of a play or novel? A. The scenario is prepared from which the director arranges his working directions.

Q. Are parts extracted from the play, or the novel and distributed among the actors? A. Not always; different directors have different methods.

480 Q. There has been some discussion about lines being spoken by artists while posing before the camera. Are the same parts and same characters as they are in plays given to actors in posing for the pictures? A. You mean lines?

Q. Yes. A. No, lines are given to them.

Q. As matter of fact in instances where there is an appearance of conversation between artists in posing for the camera, what lines if any, are given to those people? A. The director usually forms those lines.

Q. And are those lines necessarily from the play, or the novel? A. Not necessarily.

Defendant's: John F. Pribyl—Direct

Q. Is there a selection at all in regard to the particular lines or words used? A. All those which are registered upon the screen.

Q. Now, in the selection is there discrimination used in the selection of scenes or incidents in the reproduction of the play or novel in the motion picture? A. Yes, sir; the dramatic and spectacular and the strong.

Q. That is what is selected? A. Mostly.

Q. In the case of the reproduction of a play for motion pictures, do you sacrifice the dramatic and spectacular in order to get a true and correct representation of the play as originally produced? 482
A. We do not.

Q. That is not followed by your company? A. No, sir.

Q. And all the lines of the play are not spoken? A. No.

Q. During the performance for the camera? A. Not the exact lines.

Q. Now, in the case of the picture known as "Monte Cristo," do you know what was used for the making of that picture, whether a manuscript or document or scenario? A. I do not.

Q. Were there directions prepared for the use of the artists in making the picture? A. The players? 483

Q. Yes. A. No, sir.

Q. Were their directions prepared for the use of the director himself? A. The director prepared his own directions.

Q. And I show you a document and ask you whether that represents the directions that were prepared for the making of this picture?

Mr. Gerber: I object to that. The wit-

484 Defendant's: John F. Pribyl—Cross

ness has already told us he was not present, and did not prepare the scenario. In fact it was prepared in California by a man named Campbell, and I do not think this man was there.

The Court: You may cross-examine him, and ask.

In answer to Mr. Gerber:

Q. Who prepared this picture? A. Mr. Colin Campbell.

485 Q. It was prepared where? A. In California.

Q. Were you there at the time? A. I was not.

Q. You were in Chicago? A. Yes, sir.

Q. You were not present while the picture was being taken in California? A. No, sir.

Q. Do you know what directors were directing it? A. I do not.

Q. Did you know what scenario he had before him? A. I did not.

Mr. Gerber: I submit this witness is incompetent.

In answer to Mr. Burkan:

486 Q. Have you followed the picture with the aid of what you now hold in your hand?

Mr. Gerber: I submit he can introduce anything he desires for the aid of the Court, but I do not think this witness, who is very frank, cares, or should be put in the position of swearing to things which your Honor can determine from a reference to the various offers, and I have no objection to their directly getting him to state the facts to Mr. Burkan, on the same basis your Honor had me do mine.

Defendant's: John F. Pribyl—Cross

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The Court: If this is a scenario gotten up by this witness, and he knows it correctly describes the play as we have seen it. I will receive it for the information of the Court, and as an aid to the Court. And if it is what he prepared in order to give to the Court, to his recollection, a correct account of these pictures that we saw, I will receive that to refresh the recollection of the Court as to the pictures.

Mr. Burkan: What I propose to show is this, that these directions—after the completion of the picture were sent in the regular course of business to the home office and they were checked up, and these directions show substantially the pictures, because they indicate the characters and the contents. 488

The Witness: If the Court would permit, I might explain how I know that, and why it is so clear that that was what they worked from, although I do not know it was, only by the method of the office.

The Court: You may describe the method of the office. 489

Q. Please tell the Court the method employed in making the picture, and checking the pictures, as to accuracy, and whether they complied with the requirements of the office, if you know, in the manner of making the picture? A. After the picture is completed, together with the negative of the production and all the literature pertaining to the production, with which the directors have worked, is sent to the Chicago office for their files, and also for verification, as we are obliged to

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trim up these pictures and get them in shape, and in details, we may eliminate certain parts and add certain parts, and must necessarily have all the working material, and that is all the working material we receive, and it is a natural conclusion that that is all the producer had.

In answer to the Court: Q. That is what you received from California with the picture? A. With the negative.

Q. What did you do after you received it? A. After we received it, we verified the fixed scenes 491 in the negative which is sent to us.

Q. How do you verify it? A. Check it up. There is some number here—every scene is numbered by a number, and then we tally up, and the trimmers cut the various parts which are necessary, and assemble the picture, adding in the various titles, and making a complete negative from which prints are afterwards made for the distribution. In order to be able to do that intelligently we must have all the material with which the directors worked, and invariably they send us all. If it is a novel or play and scenario of a play, they come 492 with the directors' own directions; and he sent us naturally all this material which I hold in my hand; from which I assume that was all he had.

The Court: Of course it is no proof it was all he had.

Mr. Gerber: If your Honor will glance at it, it is the same we had in this record, and if your Honor will glance at it, it would be of no more use to you than if I gave you the Bible in Greek. Will you glance at it?

The Court: Yes.

(Hands paper to Court.)

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The Witness: (Continues) It is all the director requires.

The Court: I will receive this, not as evidence that it was all that the director had, or what the director did actually have, but as a paper in connection with the production of this picture which was received by the General Film Company—

The Witness: No, by the Selig Polyscope Company.

The Court: That is the Selig Polyscope Company at the Chicago office, and was 494 made use of by them in getting the reels ready for distribution. I think it will be some help in recalling what the scenes were that were portrayed.

Mr. Gerber: If it is an aid of the Court, I do not object.

Mr. Burkan: I offer it in evidence.
Received and marked Exhibit 24.

In answer to Mr. Burkan: Q. I show you a paper, and ask you if that is a correct description of the pictures of the picture play known as "Monte Cristo." (Paper shown witness.) A. It is.

The Court: Who prepared it? 495

Mr. Burkan: I prepared that.

Q. What was done? Did you receive this paper from me? A. I did.

Q. And after you received it what did you do with it? A. I went to the General Film Company.

Q. With whom? A. Took a stenographer from Mr. Burkan's office. We had the picture run off, stopped the picture at various points in order to copy the captions.

Q. You mean the text? A. Text, reading matter; and in other ways verified this description.

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Mr. Burkan: I offer it in evidence as an aid to the Court.

Mr. Gerber: No objection for that purpose.

The Court: I will receive it for that purpose.

Marked Exhibit 25.

Q. How many pictures constituted this motion picture of "Monte Cristo"? A. How many scenes do you mean?

497 Q. Yes. A. I believe there are thirty-seven in the first reel; forty, or, I am not positive how many altogether.

Q. How many in the three? A. Approximately the same.

Q. How long a time does it take to run that picture in the usual and ordinary course of events? A. For each reel from twelve to fifteen minutes, or forty-five in total.

Q. What is the average duration of a scene as shown on the screen? A. It will vary from a flash to a few seconds.

498 Q. And sometimes it is only the suggestion of an incident, and sometimes an entire incident is depicted? A. In the action.

Q. An entire action is depicted? A. Yes, sir.

Q. And in order to aid the audience in determining the action and follow the action you throw upon the screen a text? A. We do.

Q. That is no part of the picture, is it? That is made no—

Mr. Gerber: I object to that as his conclusion.

Q. How do you prepare the text for use in showing these pictures? A. After viewing the nega-

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tive if the action is not sufficiently explanatory, we then add in some text in order that the audience may fully understand the picture.

Q. And when is this text prepared; before or after? A. In our office after.

Q. After the completion of the negative? A. After the completion of the negative.

Q. Did you examine the comparison that was prepared and offered in evidence yesterday afternoon by Mr. Gerber? A. I did.

Q. Now, will you please turn to the picture 7. It is claimed first in the comparison (page 72) 500 that the appearance of Noirtiers in that picture was taken directly from the plaintiff's play. In the novel Noirtiers is the father and he does not appear until after the escape. Now, have you made any study to ascertain whether that is the fact? A. I have.

Q. Please point out to the Court—take the Dumas dramatization or anything else you have there and show the Court where Noirtiers appears at or about that same time, and consecutively as depicted by Dumas? A. In Dumas' dramatization Part I, Act II, pages 17, 18, 19 and 20. In Scene 5 the entree of the Unknown to Edmond: 501 "Tell me, Mr. Edmond, what? There is a gentleman outside who wishes to speak to you. EDMOND: To me? PAMPHILE: (Indicating.) UNKNOWN: Yes. EDMOND: Continue, my friend, I am at your service, Mr. Morrell. MORRELL: Well, will I accept this presidency? DANGLARS: Aha, Aha. Then the Unknown who was looking for Edmond. What does he want me for? EDMOND: Do you wish to speak to me, sir? UNKNOWN: Are you the second mate of the Pharon? EDMOND: Yes, I have been

captain for the last few minutes. UNKNOWN: No matter. I have learned, sir, and I have been informed that your vessel landed at Elbe, and at Naples at the Island of Elbe?" Quite true, sir.

The Court: Haven't you prepared all this?

Mr. Burkan: Yes, sir.

The Witness: It is all prepared.

Mr. Burkan: For the purpose of aiding the Court we offer in evidence the pictures, statement of the pictures, and also the statement of the sources.

Mr. Gerber: For the purpose of the parallel column to aid the Court?

Mr. Burkan: Yes, sir; to aid the Court I have simply prepared the statement.

The Court: The questions already asked and the answers indicate the purpose and the force and scope of this exhibit.

Received and marked Exhibit 26.

Q. It is claimed that in your picture you show Caderouse as being the owner of the Reserve Inn? A. We do not.

504 Q. Do you show it by action or by text? A. No, sir.

Q. Do you show LaCarconte in any of your pictures as being the proprietor of the Reserve Inn, or the wife of Caderousse until the Pont du Gard is reached? A. No, sir, we do not.

Q. Do you know the age of Villefort as described in the novel? A. Twenty-seven.

Q. What is the age of Noirtiers as described in Dumas' dramatization? A. About forty-five.

Q. Forty to forty-five? A. Forty to forty-five.

Q. And his costume is also described? A. It is.

Q. After your pictures are completed, is it the practice to submit the pictures to a Board of Censors? A. It is.

Q. And they frequently make cuts in the pictures? A. Yes, sir.

Q. Tell the Court what cuts are? A. Cuts are eliminations which the Board of Censors may find objection to. It may require modification of certain scenes, or eliminations entirely.

Q. Can you cut out and make any cuts that may be required, if at all, in a picture like the "Monte Cristo"? A. We can.

Q. You can substitute others in their place? A. No, we cannot.

Q. I mean is it possible? The only change you can make would be to cut that particular scene or action? A. Yes, sir.

Q. Has it been your experience that important and material scenes are sometimes ordered stricken out or eliminated by the Board of Censors? A. I have seen that done.

Q. Has that been done? A. It has been done.

Q. Do you know of any recent case in which it has been done?

Mr. Gerber: I object to that.

The Court: I understand your point exactly.

Mr. Burkan: That we can make cuts if necessary.

In answer to Mr. Gerber—Cross-examination:

Q. Did you see any performance of this film in any theatre in the City of New York? A. I did; in Brooklyn.

Q. Did you see it in the Delancey Street Theatre? A. I did not.

Q. Do you know whether in giving the performances after your receiving the letter which I read in evidence, any cut was made in any part of the film? A. I am not positive.

Q. Don't you know that you started to make cuts; for instance, in the part after the suicide of Villefort at the Pont du Gard you started to cut "One," and stopped right short? A. I do not.

Q. In the performance on Delaney Street? A. I do not; I don't know whether we did or not. The General Film Company may have made it.

509 Q. Was there any cut made in the play that you recall? A. I do not now recall any.

Q. Did you see any performance after you got our letter, Gerber, Dittenhoefer & James? A. Only one in Brooklyn.

Q. Was that after our letter? A. Yes.

Q. Was there any cut made? A. I don't know.

Q. You would not say there was not? A. I would not say there was not, nor was.

Q. You don't mean to tell the Court that the slide describing the incidents of the picture was not material to the picture? A. I did not say that.

510 Q. You do not mean to tell the Court that this Exhibit 24, which you say you received from California did not contain the instructions as to what should be put on the slide? A. It contained suggestions.

Q. Let us see. I have not had time to go through it all, but I will take one I have made a note of here; say, for instance, No. 35. I see on that printed with the typewriter. That came to you typewritten? A. Yes, sir; as it is.

Q. There was the typewriting: "The world is mine." Do you mean to say that was requested, or

wasn't it, on the slide as we saw it yesterday? A. It was on the slide.

Q. Isn't that part of the wording, and no part of the action? A. The camera cannot speak.

Q. So that in portraying this picture in California, Mr. Campbell had that incident in mind, and gave instructions that the screen should show the words "The world is mine," as he stands upon the rock? A. Those words appear in the novel also.

Q. Where in the novel? Don't you know that they only appear when Monte Cristo gets out or 512 discovers the treasure, and he says, "The treasures of the world are mine"? "The world is mine." Don't you know that it only appears there in that novel? A. What difference does it make when it appears, if it appears?

Q. Isn't that the only place where it appears? Answer me now. You have read this dramatization. A. I will say in answer to that, that we do not abide to the written script. We make written changes and—

Q. I ask you what this novel contains. Did you find that in the novel when Edmond Dante escapes from prison? A. No. 513

Q. Did you find it in any dramatization when he escaped from prison? A. None that I remember.

Q. You have read them all? A. No, I have not.

Q. All that is introduced in evidence before the Court? A. No.

Q. Which haven't you read? A. The James O'Neill, I think.

Q. Now, let us take some more language here. I find on the very next page in typewriting in the caption: Over the words nine seven three—forty—

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three, the words: "The world is mine." That is the way it came from California, isn't it? A. Yes, sir.

Q. What do these letters nine seven three—forty-three mean? (Paper shown witness.) A. That is the number of the scene.

Q. That is what you put in? A. That is what we put in in assembling the picture.

Q. That is, Mr. Porter spoke of assembling the pictures? A. Yes, sir.

515 Q. Now, let me for the purpose of illustration go still further: I find over the words nine, seventy-four, thirty-nine, the words: "You will not fight," next, "Why not?" Next, "Because he is your son." That is the way it came from California, was it? A. Yes, sir.

Q. That is the way it appears by the picture? A. Yes, sir.

Q. Now, can you tell the Court any book or dramatization other than O'Neill's that has Albert as the son of Mercedes by Edmond Dantes? A. I will have to refresh myself from the record.

516 Q. Isn't it a fact that he was Fernand's son, and in the book is not the incident that Edmond Dantes tried to get this quarrel with him in order that he might strike Fernand through his son? Isn't that the story of the novel? A. I will consult the records. I have varieties and quantities of these things. I am not a walking encyclopedia.

Q. Can't you answer my question from having read those different novels? A. No, sir.

Q. That is rather dramatic, isn't it, to have an incident like that, or a climax where a woman says to a man who wants to kill another, "He is your son," and for that reason you won't kill him? That is pretty strong, isn't it? A. Yes.

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Q. Let me take one or two other incidents as we go along. I noticed in your picture yesterday that at the Chateau d'If, while Dantes and the Abbe Faria are in the cell together, they have broken one of the stones so that the guard may fall, he recognizes the voice of Villefort. You have that in the picture? A. The voice was mentioned in the novel.

Q. Isn't it in the novel that the voice is that of the governor of the prison? A. No, I do not recall. I know the voice was mentioned there.

Q. Do you know of any version other than the 518 Fechter version in which that individual is De-Baville? A. I am not sure.

Q. Let us now go on to the next. It is the Pont du Gard that is your next scene. You know, do you not, that in the novel the man that is murdered, and actually murdered, is Johannes, the jeweler? You know that? A. Certainly.

Q. Are you familiar with this novel at all? A. I have not read it, but a long time ago.

Q. Is that comparison by which the Court is to be aided, something which you do not remember? A. The attorneys prepared it, and I have verified that with the various means at my command. 519

Q. Are you prepared to state to the Court that the comparison is true? A. I am prepared to state to the Court that the comparison is true, as far as I have verified it. I verified every act.

Q. After you prepared it? A. It has been prepared by the attorney's office, and I have verified it.

Q. Did you ever read the "Count of Monte Cristo"? A. I read the "Count of Monte Cristo" some years ago.

Q. Did you ever read the French Lacy version?

A. Not through.

Q. Let me give further one or two incidents and see how much you do know about it. Who killed Johannes in the Pont du Gard scene in the novel?

A. The woman killed the peddler.

Q. Don't you know that it is Caderousse, the husband, and don't you know that Caderousse—the brigadier has arrested Berturcio for the murder? And don't you know that Caderousse confesses and is sent to the gallows for it? A. I

521 don't recollect so far.

Q. Don't you know that there was never a version such as where Caderousse is stopped from assisting LaConconte in committing the crime? A. I don't know.

Q. Don't you know that there is no version except this one where there is no murder committed, but that stopped her by shooting La Conconte? A. I could not tell unless I consulted the records there to verify it.

Q. Now don't you know this is the end of Villefort in the novel? A. (Witness pauses.)

522 Q. Don't you know he goes crazy? A. (Witness pauses.)

Q. Don't you know that the novel ends where he is supposed to have buried the illegitimate child of Madame Danglars'? A. I haven't read the book in some time.

Q. What is the end of Morcerf, who was Fernand? A. (Witness pauses.)

Q. You know in the picture he appears in the last scene where he is supposed to go off and hide and shoot himself, which you saw yesterday? Isn't that so—in the picture? A. I guess in the woods he shoots himself.

Q. Now, what is his son in the novel? A. Why, this series was not verified back by the novel. There are various links—

Q. What is the way that Villefort terminates his life in the novel? A. I don't remember.

Q. What is the way it ends in the De Lacy version? A. I will have to consult for that.

Q. Don't you know that in the novel he is in his house, and then has Mercedes as his wife, and Albert towards the end of the book leaves him, and he commits suicide in his house, Mercedes and Albert leaving him. Don't you recall that? A. No, 524 sir.

Q. Do you recall the end of Danglars in the book? A. I have told you, Mr. Gerber, that I did not remember the novel fully as to that.

Q. See if I can refresh your recollection.

The Court: Don't you think you have gone far enough on that line?

Mr. Gerber: Yes, I suppose so. I will ask just this one question in order to refresh your recollection.

Q. Don't you know that in the novel Danglars is a banker, and the Count of Monte Cristo comes to him, and comes with an unlimited letter of 525 credit, and gets five million francs, which practically takes from him all his money? Don't you remember that Danglars then runs away, is captured by brigands, one being Vampimuga, and they starve him until he gives up five million; that they release him then at the request of Monte Cristo, and that is the last you hear of Danglars, and he becomes an outcast? Do you recall that in the novel? A. No, I do not.

Q. Well, can you tell me why Mr. Campbell did not take any of the other interesting scenes

in the novel and put them in that picture if he did not take our version?

The Court: Is there "one, two, three" in the novel?

The Witness: It is.

Q. Do you mean to say that Monte Cristo does not even know of the suicide of the Count of Morcerf in his house? A. I do not.

Q. Don't you know that in the book Monte Cristo does not kill any one of the three? A. No; the play is not compiled entirely from the book either. It is compiled from various sources.

Q. Well, tell me any other source that is taken from. A. I should have to verify that by the document.

Q. Tell me any other source. You have told us of the novel. Give us the Lacy version. Now, what source. A. The source here in evidence.

Q. What other source? The Court has a right to know, and I have a right to know? A. I know of no other source.

Q. Now, you did not prepare the scenario? A. I did not.

Q. And you do not know what source Mr. Campbell went to when he prepared it? A. I do not.

Q. Where is Mr. Campbell? A. California.

Q. He is there now? Why didn't you have him here? A. Because he has just returned from Panama, and he is engaged in a very important featuring preparation.

Q. Why didn't you have him here, and let him ask this question? A. It is not for me to say. Our counsel handles that.

Defendant here rested.

JAMES O'NEILL, re-called:

In answer to Mr. Gerber—Direct-examination:

Q. You were an actor as far back as 1879, say?

A. Yes, sir.

Q. Now, in those days there was no typewriters, were there? A. I think not.

Q. How did the actor used to get his part of manuscript plays? A. Simply then by part written with a pen, and with simply three or four words as a cue preceding each speech, but in 1876, I think, I was a member of the Union Square Company under the management of Ray M. Palmer; among other plays we produced here a Russian play called Danschell, which was translated and adapted for this country by Mr. Larsaran. Instead of giving out written parts, they handed each of the company the characters and play like that (indicating), and that size.

Q. But the play was not published generally, was it? A. It was printed but not published.

No cross-examination.

EDWIN S. PORTER, re-called:

In answer to Mr. Gerber—Direct-examination:

Q. I notice in here, on the statement which has been read in evidence, the admission that this picture was exhibited at the Delancey Street Theatre. Did you witness the performance at the Delancey Street Theatre? A. I did.

Q. Now, at that time state whether any part

of that picture was cut as distinguished from the picture which you saw yesterday exhibited at the office of the General Film Company? A. There was a difference. There was the elimination of a title at the Delancey Street. "The world is mine," was eliminated. There were three other cuts. In the scene where, after the suicide of Villefort, when Edmond says, "One," that was eliminated. In the duel scene after the suicide of Fernand, when he says—Monte Cristo says, "Two," that was eliminated; was cut and was 533 evidenced. There was a jump there; the hand just about to raise, and it showed evidence of cutting out that scene. It ended on with the hand only. Also after the Count of Monte Cristo fights the duel with Danglars, and kills Danglars, that was also—when he says "Three," that was also eliminated.

Q. Was that evident to you as an expert? A. It was; I called Mr. Knox's and Mr. O'Neill's attention as the performance went on at that time to it, and called their attention to that jump. I said, "Don't you notice that the hand is up, that word 'one' which is cut off, and the continu- 534 ation of the action after that was cut off?"

Q. In fact didn't you call my attention to the word when the picture was taken, so as to call the Court's attention to it? A. I called your attention to that. I said, "Watch for those cuts." That was while I was on the way there, and during the performance of the picture. Also then I will say the picture which was shown to me at the General Film Company, and after I got there—you will remember we were asked to look up—

Q. When Mr. Pribyl was being examined about it? A. Those cuts were also in that picture.

In answer to Mr. Burkan—Cross-examination:

Q. You mean the picture was in the same condition yesterday as it was when Mr. Pribyl was examined? A. It was not.

Q. You mean that since the examination of Pribyl in regard to the pictures those cuts have been made? A. No, This print evidently was not the same—

Q. No, do you mean to tell this Court that after we showed the picture, after Mr. Pribyl's examination that we made cuts of it? A. I don't mean to say you made cuts in it because you could not 536 cut it, but I mean to say there were parts, if this was the same picture, where there were cuts made, put in.

Q. You mean added to the picture? A. If it is the same print, if it is identically the same print, it has been added.

The Court: Where does "One, two, three" appear?

Mr. Gerber: It appears for the first time in the O'Neill version at the death of each man—because the deaths occur at times in the novel when Monte Cristo could not say, 537 "One, two, three."

Mr. Burkan: Caderousse dies and the Count says, "One."

Plaintiff here rested and evidence closed.

The Court: I am sorry I cannot decide this case now, but I will reserve decision.

Mr. Burkan: I will renew the motion made at the end of plaintiff's case and I move to dismiss the complaint. I renew the motion to strike out

Motion to Dismiss

paragraph 6 of the Stetson complaint which was admitted in evidence.

Motion denied, and exception.

Mr. Burkan: Also I move to amend my answer to conform to the pleading by alleging that this Court has no jurisdiction of this case, because it affirmatively appears that the play claimed to be owned by the plaintiff was produced in motion pictures and duly copyrighted pursuant to the statute of the United States.

Mr. Gerber: I object to the amendment of the answer, as putting in a new defense at the close of their defense.

The Court: I will grant your motion.

Exception taken by Mr. Gerber.

Mr. Burkan: Now, I move to dismiss the complaint upon the ground that it appears that in 1868 a man by the name of Webster deposited in the office of the Lord Chamberlain of England a play known as "Count of Monte Cristo," alleged to have been written by Mr. Fechter. That he made that deposit in pursuance to the English statutes, in order to secure permission to produce that play publicly; and that the play was publicly performed under that license, and that under the decisions of this State that was a publication sufficient to make that play public property. It was filed, and it was made a public record, and marked as an exhibit and produced here at this trial. Under the English statute having been produced makes the performance of the play a publication. And also as to the copyright, under the statute which we have offered in evidence, the duration of the copyright is forty-two years, and consequently if that copyright existed, it expired. As

Certificate Case Contains All Evidence

far as this plaintiff is concerned, if they did secure a copyright, it would have expired in 1908, and this is an attempt to continue literary property, common law rights beyond the time allowed by the copyright statutes.

Also further I move to dismiss the complaint on the ground that the copyrighting of the motion picture in Washington in pursuance of the statutes divested the plaintiff of any common law rights of property that this plaintiff may have had in this play.

Also they have not shown any title in this property to the version in the possession of Mr. Webster, and under the law possession is only presumptive evidence of ownership. The evidence is that Mr. Webster had in his possession a manuscript, and he placed it in the office of the Lord Chamberlain, and secured permission to produce that play. That Fechter in his lifetime produced the play up to 1879, and we have the evidence that Mr. Fechter's widow brought suit to restrain Mr. Stetson from producing the play, but she died before the action was tried.

Further I move to dismiss on the ground that by their publication of these posters, that that was a publication.

I submit on all the facts in the case they are not entitled to a judgment.

The Court: Motion denied. Exception.

The foregoing case and appeal contains all the evidence taken and proceedings had upon the trial of this action.

Plaintiff's Exhibit A

Manuscript of play "Monte Cristo" by Charles Fechter, to be submitted upon the argument of this appeal.

Plaintiff's Exhibit B

Stipulation as to Certain Facts

NEW YORK SUPREME COURT

COUNTY OF NEW YORK

JAMES O'NEILL,

Plaintiff,

against

GENERAL FILM COMPANY,

Defendant.

An order having been obtained, granted by Mr. Justice Davis, dated the 27th day of February, 1913, and one granted by Mr. Justice Donnelly, dated March 18, 1913, for the examination of the defendant, by its president, Frank L. Dyer, before trial.

IT IS STIPULATED for the purpose of avoiding the examination, and this stipulation may be read in evidence by either party on a trial or trials of this action, with the same force and effect as though the testimony were given on the examination of the said Dyer, as follows:

1. That the film exhibited to the plaintiff, and his counsel, at the office of the defendant, on the 8th day of April, 1913, of "The Count of Monte Cristo," is one of the films used by the defendant in the exhibitions given of "The Count of Monte Cristo," and the same is marked for identification, Plaintiff's Exhibit 1, of April 8, 1913.

2. The said film was manufactured by the Selig Polyscope Company, an Illinois corporation.

3. The defendant's business is the distribution of films for motion picture exhibitions among proprietors and managers of motion picture theatres.

4. That among the films distributed for purposes of exhibitions by the defendant, were films of "The Count of Monte Cristo," of the same kind and character as the one marked Plaintiff's Exhibit 1, of April 8, 1913.

5. That the said film, showing a motion picture exhibition of "The Count of Monte Cristo," was leased, among other places, to the Delancey Street Theatre, New York City, about October 14, 1912, to the Lincoln Square Theatre, New York City, about October 25, 1912, and to Loew's Seventh Avenue Theatre, New York City, about November 11, 12 and 13, 1912.

6. That the said theatres above mentioned are theatres giving motion picture exhibitions, to which the general public is invited for an admission fee, and that each of the foregoing theatres has a stage, curtain and scenery, auditorium and balcony and boxes.

Plaintiff's Exhibit B

7. That in giving the said exhibitions at the said theaters, a screen is hung from the flies above the stage to the stage, and the pictures shown by means of a projecting machine, which projected the action of the characters in motion upon the screen. That the stage and the curtain and scenery of the theatres are not used in connection with exhibitions of the said picture.

551 8. That between the 14th day of October, 1912, and the 13th day of January, 1913, not less than forty films were distributed by the defendant among motion picture theatres, and with each of the said films exhibitions of said picture were given, and that the defendant intended to continue distributing said films for motion picture exhibitions, until restrained by an order of this Court.

9. That compensation was received by the defendant from the parties who received the films and gave the exhibitions with the use of said film.

552 10. That plaintiff's attorneys sent to the defendant on or about the 17th day of August, 1912, a letter of which the annexed, marked "Exhibit A" is a copy, enclosing a letter, of which the annexed, marked "Exhibit B," is a copy.

Dated, New York, March 1, 1915.

DITTENHOEFER, GERBER & JAMES,
Atty. for Plff.

NATHAN BURKAN,
Atty. for Deft.

Exhibit A

Annexed to Exhibit B

(Copy)

DITTENHOEFER, GERBER & JAMES,
96 Broadway, New York

August 17th, 1912.

General Film Co.,
200 Fifth Avenue,
New York City.

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Dear Sirs:

For your information we beg to enclose you copy of a letter sent this day to the Selig Polyscope Company. This letter is sent to you so as to advise you of Mr. O'Neill's rights, and to notify you that in the event of your putting out any of the films in question, proceedings to restrain such action on your part will also be brought.

Very truly yours, 555
(Sgd) DITTENHOEFER, GERBER & JAMES.

556

Exhibit B*Annexed to Exhibit B**(Copy)*

August 17, 1912.

The Selig Polyscope Company,
2 E. Randolph Street,
Chicago, Ill.

557 Dear Sirs:

Mr. James O'Neill, the celebrated actor, has owned and controlled for many years a special dramatic version of the famous "Monte Cristo," by Alexander Dumas. That has been elaborated, with many episodes, incidents and characters original with him in developing the original story, and has become for many years past and still is a valuable piece of property.

We are informed that you have made a film based upon the same story. On behalf of Mr. O'Neill we write to notify you that any use by you of Mr. O'Neill's version of the story and containing characters or episodes solely and exclusively used in his version, is an infringement of his rights, seriously injures valuable property, and that proceedings will be brought to restrain any such use by you.

Very truly yours,

Plaintiff's Exhibits C and D*(Page 71)**Comparison*

PICTURES. PART I.	PLAY.
"Edmund Dantes and his betrothed Mercedes."	Not in play.
Scene shows Edmund and Mercedes on rocks.	
"M. Noirtier, the Bonapartist Committee, entrusts Captain Leclercq with a letter to the exile at Elba."	Not in play
Scene shows the departure of the ship "Pharaoh," Noirtier shaking hands with the captain.	
"Fearing the near approach of death, Captain Leclercq begs Dantes to deliver the letter to Napoleon." (Address of letter.)	Told in play.
"Napoleon Bonaparte, Porte Farraio, Elba."	Told in play.
Scene shows captain in bed and Dantes receiving a letter and ring from him. The captain dies.	
"Dantes incurs the hatred of Danglars, the envious super-cargo, when he assumes command of the 'Pharaoh.'"	Told in play.
"Dantes delivers the letter to Napoleon at Elba."	Told in play.
The scene shows a room with three men in uniform in it. A table in the centre of the room. To the back of the room is a high-backed chair in which is seated Napoleon. The back of the chair is towards the audience. Dantes enters, speaks to the guard. Napoleon comes to the centre of the room, speaks to Dantes. Dantes shows Napoleon the ring.	

Plaintiff's Exhibits C and E

Comparison

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"Napoleon entrusts Dantes with a reply to M. Noirtier." The scene is the same, Dantes receiving a letter from Napoleon, kisses Napoleon's hand and leaves.	Told in play.	Described in book.
"Dantes returns home." This scene shows the people waiting for the return of the "Pharaoh." As Dantes leaves the ship he meets Morel. Noirtier to the side, speaks to Dantes. Dantes shows him the ring. Danglars is standing back.	Dantes does not meet Morel until he sees him at the Reserve. Noirtier meets Dantes and asks about the letter. Is told he will receive it within an hour.	Dantes meets Morel and tells him about his visit to Elba. Noirtier does not appear in the book until after Dantes escape from prison.
The next scene shows the street in which Morel's office is. Morel and Dantes going to the office.		
The next scene is Morel's office. Morel and Dantes enter. Dantes gives Morel some papers. Danglars enters and tells Morel something. Morel does not seem inclined to believe what Danglars says and turns to Dantes and questions him; his replies seem to satisfy Morel.	Told in play.	Described in book.
"Dantes' Father." The scene shows a room with an old man in it. Dantes enters and embraces him.	Not in play.	Described in book.
The next is Morel's office with Danglars leaving and as he comes out he meets Caderousse, who takes him into the inn.	Told in play.	Described in book.
The next is the interior of the inn with Danglars seated at a table; Caderousse in the room with him. Caderousse calls and Carconte enters. Caderousse says something to her; she goes out and returns with a tray on which are two glasses and a bottle, which she places on the table. Danglars and Caderousse drink.	Stage setting the same. Caderousse is an innkeeper. His wife appears and serves Caderousse and Danglars. All stage business the same.	Described in book the same, except that Caderousse is supposed to be a tailor. His wife, Carconte does not appear until Dantes comes to the port du Gard.

Plaintiff's Exhibits C and E

Comparison

(Page 73)

Caderousse is drunk. Caderousse goes out.		
"M. Morel gives Dantes his captain's papers as a wedding present." Scene shows Dantes, his father, Morel and Caderousse, Morel giving Dantes the paper.	Morel gives Dantes his papers as captain as wedding present.	Morel tells Dantes he wants to make him captain of the boat "Pharaoh," but that he has a partner whom he must consult.
Then is flashed the inn scene again with Danglars seated at the table. Caderousse comes in and tells him that Dantes has been made captain of the "Pharaoh."	Caderousse tells Danglars Dantes has been made captain of the boat "Pharaoh."	Caderousse in the presence of Danglars addresses Dantes as captain.
"Dantes incurs Fernand's hatred." Scene shows Mercedes and Fernand talking. Dantes appears and embraces Mercedes and offers his hand to Fernand, who refuses it, draws a knife and walks away.	Told in play.	Described in book.
The next scene shows the inn with Fernand, Danglars and Caderousse at the table. Noirtier at the gate.	Noirtier comes in and talks to Danglars about the stop at Elba.	Noirtier does not appear in the scene. Danglars knows of the visit to Elba, and of him leaving there with a letter.
"Incensed by the news of Dantes' promotion, Danglars schemes his ruin." The inn; Danglars and Fernand seated at a table. Danglars writing a letter. Caderousse leans forward and tries to take the letter; Danglars throws it down; Fernand takes it and rushes off. Caderousse starts after him, Danglars grabs him, they struggle; Danglars picks up a bottle and gives Caderousse a drink; Caderousse smiles and walks off with Danglars.	Same in play. Stage business the same. Noirtier comes in.	Described in book, except Noirtier does not appear—Noirtier does not come into story until after Dantes' escape, and then he is an old man and paralyzed.
During this scene Noirtier is in the background. He comes to the gate, opens it, steps up very quietly. When Fernand rushes off with the letter, Noirtier comes forward two or three paces.		

Plaintiff's Exhibits C and E

(Page 74)

Comparison

The next scene shows Fernand at the office of Villefort.	The letter has been sent to Villefort; Fernand does not bring it to him.	Not in book
"Villefort, high in the office of the King, fearing Dantes carries a message concerning Napoleon's return from exile which would kill his own ambitions, determines to remove the sailor from his path."	Told in play.	Described in book.
This scene shows Fernand giving Villefort the letter, which reads as follows: "The Royal Procureur is informed that Edmund Dantes, Mate of the 'Pharaoh,' now in port, was entrusted with a letter by the usurper for the Bonapartist Committee. Proof of his crime will be found upon arresting him, for if the letter is not found on his person it will be found in the cabin."	Same.	Same.
A Friend of the Throne. "The betrothal feast." The scene shows the inn with a long table at which are seated a number of guests.	Represented as being wedding feast; Dantes having been previously married to Mercedes. Stage business the same.	This is supposed to be betrothal feast; Dantes is supposed to be married next day.
Then is flashed the outside of the building with guards walking up the stairs. Then the inn with the guards entering. The leader of the guards asks a question, Dantes arises and answer him and they go out together. Then is flashed the outside of the building again, with Dantes and the guards walking down the stairs. Then is shown Villefort's office. Dantes shows him a letter.	Not in play	The arrest of Dantes is described in book; Dantes is taken before Villefort and show him the letter.
"M. Noirtier, Bonapartist Committee, Paris." Villefort reads the letter, takes Dantes to a fireplace with him and burns the let-	Villefort receives the note from one of his men who found it on board the "Pharaoh," and finds it has	Same in book.

Plaintiff's Exhibits C and E

(Page 75)

Comparison

ter; turns to Dantes and is apparently telling him everything is all right. In the meantime the leader of the guards enters by another door; Villefort says something to him in an undertone. Dantes goes out, and just as he gets to the gate, this man arrests him. Villefort comes to the door and looks after them.	been addressed to Noirtier. He then directs the officers to go to the Reserve and arrest Dantes, whom he has previously released.	
"To the Dungeon of the Chateau D'If." A water scene with a row boat, guards seated in it; Dantes in the rear seat. They row off.	Not in play.	Described in book.
The next scene is the Chateau d'If with the boat very close.	Not in play.	Described in book.
The next is the opening of the doors; guards standing around. The boat lands Dantes and a guard steps out of the boat. He shows the guard at the Chateau a letter; Dantes and the two guards go off. The boat leaves and the doors are closed and locked by the guards.	Not in play.	Described in book.
Part II. "In the dungeon of the Chateau d'If after many years. For months the Abbe has toiled hoping to establish communication between his cell and that of some other unfortunate." This scene shows the cell of the Abbe; two guards appear and seem to take something out. Then is flashed the scene with the Abbe on the floor removing a stone. Then is flashed the scene showing him crawling through. The next shows Dantes cell; Dantes lying on a pallet. He hears a noise listens and gets up. Helps to remove the stone and drags the Abbe in.	All this in play either told or acted.	All in book.

Plaintiff's Exhibits C and E

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Comparison

"Villefort, the Procureur, makes a tour of inspection."	In the play.	Not in book.
This scene shows the rampart with the soldiers walking back and forth. Villefort and the Governor appear.	In the play.	Not in book.
"Dantes recognizes the voice of Villefort, and learns from the Abbe Faria, who was imprisoned some years later, that his exile has been due to the ambition of the Royal Procureur, the anger of Dantes and the jealousy of Fernand."	Not in play.	
This scene shows the Abbe in Dantes' cell; the Abbe talking to Dantes.	Same.	
"As the Abbe continues his tale, Dantes pictures Danglars the wealthy banker."	Villefort visits prison.	Not in book.
The scene shows Danglars as Dantes pictures him.		
"Mercedes and her husband, Fernand, now a General."		
"And his father's death in poverty."	All in play.	
In these two they flash scenes as Dantes pictures them.		
The scene then shows Villefort crossing the rampart with the Governor and guards. Dantes and the Abbe hear them. Dantes goes back to his cell.		Not in book.
The next scene is the Abbe and Dantes in the same cell; Dantes puts the Abbe on a pallet and goes back to his own cell.	Not in play.	Not in book.
The next is the cell of the Abbe, two guards going in and leaving bread. The same with Dantes.		In the book.
"Dying, the old man bequeaths the treasure hidden on the Isle of Monte Cristo to Dantes, and suggests that he sub-		Same.

Plaintiff's Exhibits C and E

(Page 77)

Comparison

stitute himself for the Abbe in the burial sack, as the Chateau's dead are cast into the sea, and there is a chance of liberty."		
The scene shows the Abbe giving Dantes the paper.	Action same.	Not in the book.
Then is flashed on the paper with parts of it missing.		
Then is flashed a cell again, the Abbe giving Dantes a knife. He takes the knife and letter with him and goes back to his own cell.		
Then is shown the Abbe's cell; the guards enter and find him dead.	Told in a general way.	Described in the book.
The next scene shows the sea, the guards walking back and forth on the rampart.		
The next is Dantes going into the Abbe's cell.		
Then is shown the rampart and sea; the guard coming and telling the other guards about the death of the Abbe.		
The next is Dantes dragging the Abbe's body into his own cell. Then Dantes going back. The guards joking about the death. Dantes getting into the bag. The guards entering and tying the bag.		
"To the graveyard of the Chateau d'If."	Same.	Described in the book.
The scene shows the guards carrying the body out.		
Then is shown the sea, the guards casting the body into the sea.		
Then is shown the sea, the body falling into it.		
Then Dantes swimming.	Same.	Described in the book.
The next scene shows a rock, Dantes being dashed against it, catches a ledge and climbs up.		
"The world is mine."		
The scene shows Dantes standing on a	In the play it is identical.	In the book, after a prayer of gratitude, stretches him-

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Comparison

rock in the middle of the sea, his arms outstretched.

"Dantes rescued by smugglers."

This scene shows a ship with the sailors looking out towards the sea.

Then is flashed Dantes on a rock. Then the ship with the sailors getting into a row boat and rowing off. The sea, Dantes swimming and the sailors rescuing him.

Taking boat back to the ship. Taking Dantes on the ship.

End of Part II.

PART III.

"The Isle of Monte Cristo."

This scene shows the sea with an island, a row boat coming to it. Dantes and some of the sailors climb up on the island, Dantes going to one side and looking at a paper. Walks around. Goes into a cave and is seen crawling out on the other side with paper still in his hand. Looks at paper, sees a small rock, points to it then goes to the rock and tries to remove it. Takes a knife and works at the rock until he loosens it, rolls it away and finds the treasures.

"Take the Abbe's legacy. Dantes has purchased the island, assumed its title and is traveling in Africa with Haydee, his adopted daughter."

"Dantes prepares to leave for Paris on his mission of vengeance, disguised as the Abbe Busoni."

Not in play.

Not in play.

Not in play.

Not in play.

self upon the ground and sleeps.

Described in book.

Described in book.

Not in book as described.

Not in book. Dantes plans vengeance when in prison.

(Page 79)

Comparison

This scene shows Dantes and Haidee, a man entering and giving him a priest's clothing.

Then is shown the Arabs crossing the desert.

"The inn of the Pont Du Gard."

This scene shows the interior of the inn with Carconte and Caderousse.

Then is shown the exterior of the inn with the Abbe looking in at the window. Then is flashed the interior with Carconte and Caderousse, the Abbe entering.

"Noirtier's persistent inquiries concern Edmund Dantes causes Villefort to determine to get him out of his way."

This scene shows Villefort's office, Villefort seated at a desk. A page enters and announces Noirtier. Noirtier enters and talks with Villefort.

"To reward the good and punish the guilty."

The interior of the inn, Dantes giving Caderousse and Carconte the diamond. Dantes goes out. Caderousse and Carconte talk about the diamond.

"Noirtier learning of Villefort's determination attempts to escape under the disguise of a jewelry peddler."

The exterior of the inn, Noirtier approaches and knocks at the door.

The interior of the inn with Caderousse and Carconte at a table talking. The peddler enters and talks with them, and shows them his pocket book. Caderousse points to the stairs. Noirtier starts to go up, Carconte says something to Caderousse, he calls the peddler back and shows him the diamond.

Staging of inn the same.

This is all in play, except the scene is laid in Fernand's house in Paris.

Same.

Described in play.

Identical.

None of this in book, except that Dantes comes to inn disguised as Abbe Busoni.

Not in book.

Same.

Not in book.

Not in book.

Plaintiff's Exhibits C and E

(Page 80)

Comparison

"Noirtier is closely pursued by Villefort."	Not in play.	Not in book.
Wood scene with Villefort coming through on horse back.		
The inn with peddler purchasing the diamond. He shows the pistols. Noirtier goes upstairs with Carconte following with a lighted candle.	Identical.	Not in book.
The bedroom Carconte and Noirtier enter. Carconte leaves and Noirtier takes off the disguise.	Not shown in play.	Not in book.
"To further his own ends Villefort suggests robbery and murder."	All this is identical staging and stage business.	Not in book.
Scene shows the inn, Caderousse smoking. Villefort enters and puts his hand over Caderousse's mouth. Carconte comes downstairs listening. Villefort seems to be trying to talk Caderousse into doing something. A struggle follows. Villefort hits Caderousse over the head with a bottle. He then meets Carconte as she comes down the stairs and orders her to go up again.		
The next is Noirtier in bed. Carconte entering with a cleaver. She goes over to the bed and just as she is about to strike, Noirtier shoots her. She comes out, falls, gets up, falls again and rolls half way down the stairs. Noirtier comes out.	Identical except that interior of Noirtier's room is not shown.	Not in book.
Then is flashed the outside of the inn with Dantes looking in at the window.	Not in play.	Not in book.
Then the interior of the inn with Noirtier coming down the stairs. He stops just as he gets to the body of Carconte. Villefort is about to stab him when Dantes enters. Villefort recognizes him and stabs himself.	Identical.	Not in book.

Plaintiff's Exhibits C and E

(Page 81)

Comparison

"The reception of the Count of Monte Cristo."	The general scene and action is the same. Haydee does not appear in play.	Not in book.
This scene shows the home of Fernand, stairs leading up on one side, guests in evening dress. Dantes and Haydee entering. Haydee wearing a veil. Dantes shakes hands with Albert, who presents him to Mercedes. She seems puzzled about him. They go into the garden.		
"Edmund Dantes reveals his identity to Mercedes."	The scene is not in play but parts are told.	Not in book.
Scene shows the garden with Mercedes and Dantes. She offers him grapes, he refuses and tells her who he is. Haydee appears to take Dantes to the ball room Mercedes going with him.		
"Edmund Dantes confronts Fernand with Haydee, whose father Fernand directed killed."	Not in play. Fernand's treachery is exposed by the papers at Dantes instigation.	Not in book.
"Mercedes' son Albert assumes the quarrel."	General scene same.	Not in book.
Ball room, Albert about to strike Dantes; Dantes grabs him by the wrist and forces him down and takes the glove from him.		
"You will not fight him."	Identical. Stage business same.	Not in book.
"Why not?"		
"Because he is your son."		
"Having learned the truth from his mother, Albert apologizes."		
Wood scene with Dantes and seconds. Albert appears and kneels at the feet of Dantes and apologizes.	Identical.	Not in book.
Fernand appears and Dantes tells him who he is.	General effect the same, except that Fernand does not kill himself on the stage.	Not in book.
"I am Edmund Dantes."		

Plaintiff's Exhibit F

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Comparison

Shows a wood scene, Fernand with a pistol in his hand. The original wood scene with Fernand dead.

"Dantes challenging the treacherous Danglars."

Scene shows Dantes challenging Danglars and getting ready for the duel. Dantes with his back to Danglars putting his coat on the ground. Danglars rushes and tries to stab him in the back, but is prevented by Noirtier. Mercedes comes on during the fight and is held back by Albert. Edmund kills Danglars.

Identical. All stage business the same.

Not in book.

End of Part III.

Plaintiff's Exhibit D

Translation of the novel "The Count of Monte Cristo," by Alexandre Dumas, published by the The Platt and Peck Co., New York, to be submitted upon the argument of this appeal.

Plaintiff's Exhibit F

Paragraph 6 of Complaint of action entitled New York Supreme Court, Kings County, John Stetson plaintiff against James B. Studley defendant.

Sixth: That thereafter and on the 31st of August, 1877, this plaintiff purchased from said Arthur Cheney the said play or drama so adapted and arranged by the said Charles Fechter and Arthur Leclercq, entitled "Monte Cristo," and plaintiff is the sole and exclusive owner thereof.

Defendant's Exhibit 1

"30 Famous
Features
a Year!"

DANIEL FROHMAN

Presents

THE EMINENT
ROMANTIC ACTOR

"30 Famous
Features
a Year!"

JAMES O'NEILL

In His Famous Version of Dumas' Masterpiece,

"The
Count of
Monte
Cristo"

The Dramatic Triumph of Three Decades

IN FIVE REELS.

Dumas' Guiding Character, as Portrayed by Its
Greatest Interpreter More Than 5,000
Times on the Stage.

RELEASED NOVEMBER 1st

This production is completely protected by copyright, and any violations or infringements will be prosecuted to the fullest extent of the law. Exhibitors can obtain bookings for this production, as well as past and future releases on the FAMOUS FEATURE PROGRAM, from the authorized exchanges in their respective territories.

"30 Famous
Features
a Year!"

FAMOUS PLAYERS
FILM CO.

Executive Offices, Times Bldg., N.Y.

ADOLPH ZUKOR,
President.
DANIEL FROHMAN,
Managing Director.

"30 Famous
Features
a Year!"

Defendant's Exhibit 2

COPYRIGHT OFFICE OF THE
UNITED STATES OF AMERICA

LIBRARY OF CONGRESS
WASHINGTON, D. C.

CERTIFICATE OF COPYRIGHT REGISTRATION

599 THIS IS TO CERTIFY, In conformity with section 55 of the Act to Amend and Consolidate the Acts respecting copyright approved March 4, 1909 as amended by the Copyright Act of August 24, 1912, that two complete copies of the MOTION-PICTURE PHOTOPLAY reproduced in copies for sale named herein have been deposited in this Office under the provisions of the said Acts, and that registration for copyright for the first term of 28 years from the date of publication of said motion picture photoplay has been duly made in the name of *Famous Players Film Company,*
New York, N. Y.

600 Title of Motion-Picture Photoplay: *Count of Monte Cristo. By Edwin S. Porter and Joseph Golden, of United States. In 5 parts.*
Date of publication *December 10, 1912.*
Copies received *December 18, 1912.*

Entry: Class L, XXc., No. 188
ERNEST BRUNCKEN,
Assistant Register of Copyrights.

(Seal.)

Defendant's Exhibit 3

Write nothing here

L1

2 copies rec'd _____
Description
rec'd _____
Fee \$1 received _____
Entry no. XXc _____

Leave all above these words blank

Cash No. _____

APPLICATION FOR COPYRIGHT—MOTION-PICTURE PHOTOPLAY REPRODUCED FOR SALE

If the work is a published motion picture, NOT a photoplay, use application form M1
REGISTER OF COPYRIGHTS, WASHINGTON, D. C. *New York.* Date, *Dec. 14, 1912*
Of the MOTION-PICTURE PHOTOPLAY named herein and REPRODUCED IN COPIES FOR SALE on the date stated herein, the following are hereby deposited to secure copyright registration in full compliance with the provisions of the Act of March 4, 1909, as amended by the Act of August 24, 1912: 1st, Two complete copies of the motion-picture photoplay; 2d, A description* of the photoplay, also \$1 (statutory fee for registration).

The copyright is claimed by *Famous Players Film Company.*

Name and address of { *Famous Players Film Company*
copyright claimant { *Times Building* *Broadway & 42nd Street* City *New York* State *N. Y.*
*The description deposited should preferably be typewritten or printed. [Please turn this over]

Name of the author of the photoplay *Edwin S. Porter and Joseph Golden*
Country of which the authors is a citizen or subjects *United States of America* [Must be stated]
[An alien author domiciled in the United States should write here in addition to citizenship "domiciled in U. S."]

The title of the motion-picture photoplay is *"Count of Monte Cristo"*

Exact date of publication *December 10th, 1912* [Must be stated]
[Date (day, month and year) when placed on sale, sold, or publicly distributed]

THE SEPARATE TYPEWRITTEN OR PRINTED DESCRIPTION ACCOMPANIES THIS APPLICATION

Send certificate of { *Famous Players Film Company, Times Building,*
registration to { *Broadway & 42nd Street, New York City, N. Y.*

Name and address { *Dittenhoefer, Gerber & James, Attorneys,*
of remitter { *96 Broadway, New York City.*

Defendant's Exhibit 3

COPYRIGHT OFFICE OF THE UNITED STATES
OF AMERICA,

Washington, D. C.

I hereby certify that the foregoing is a true copy of the application as the same was received in this office on the *Sixteenth* day of *December* 1912, for the registration of the *Motion Picture Photoplay* entitled *Count of Monte Cristo*, entered in the name of *Famous Players Film Company, Times Building, Broadway & 42nd St., New York, N. Y.*, copyright claimant, *which application remains in this Office.*

IN WITNESS WHEREOF, the seal of this Office has been hereto affixed this *twelfth* day of *September*, 1914.

(Seal) ERNEST BRUNCKEN,
Assistant Register of Copyrights.

Defendant's Exhibit 4

*Description of play filed in office of Register of
Copyright*

COUNT OF MONTE CRISTO

The Story

Reel No. 1

Edmond Dantes, a young sailor in the service of the "Pharaon," prior to a long voyage takes leave of his invalid father and his sweetheart, Mercedes. The tender farewell with Mercedes arouses the jealous hatred of Fernand, a Catalan fisherman secretly in love with Mercedes. Dantes gives Mercedes a brooch, which later again figures in the story, and sails away. In mid-sea the captain of the "Pharaon" suddenly dies and entrusts Dantes with a private letter from General Murat to the exiled Emperor, Napoleon Bonaparte, at Elba. Danglars, the super-cargo overhears the captain's dying request, and keeps the knowledge in the event of future need. When the vessel touches Elba, Dantes delivers the letter to the deposed Emperor, and promises to deliver Napoleon's reply to Noirtier, of the Bonaparte Committee. In Dantes' absence, Fernand urges his hopeless suit to Mercedes. On the return of the "Pharaon," Morell, its owner, makes Dantes captain of the vessel, a post which Danglars had hoped to secure. After an attempt to murder Dantes, which is frustrated by Mercedes, he and Danglars discover their common enmity of Dantes, and plot his ruin.

Reel No. 2

Fernand and Danglars write an anonymous letter to Villefort, King's attorney, accusing Dantes of delivering contrabrand communications between Napoleon and his lieutenants, insinuating that such despatch may be found in the office of the "Pharaon." Villefort examines Dantes, and releases him pending the discovery of the letter. The marriage of Dantes and Mercedes is consummated simultaneously with the discovery of the guilty communication. To save his half-brother, Noirtier, of the Bonaparte Committee, to whom the letter from the exiled Emperor is addressed, Villefort causes Dantes to be apprehended at his wedding feast and imprisoned in the Chateau d'If. Deprived of his son's support, Dantes' father dies of starvation. Mercedes, believing Dantes dead, and for the sake of her fatherless child, Albert, promises to marry Fernand on his return from the war. Meanwhile, with a lone but supreme hope, with marvellous patience and persistence, Dantes works to cut a tunnel through the stone wall to liberty.

Reel No. 3

While Dantes struggles on in his cell, with his single but omnisicent hope of freedom as the only spark of cheer in the surrounding despair, with bitter suggestion of irony, the picture flashes a glimpse of Mercedes, her son Albert, and Fernand, now a Colonel. The Abbe Faria, another

prisoner in the Chateau, who in spite of the frailty of age, had for years been cutting a path to possible liberty, struggles on unremittingly, while Dantes, from the opposite side, continues his similar labor. After years of weary toil they meet in the tunnel, finding instead of liberty only each other and hopelessness. In France, Danglars is now a wealthy banker, and the creditor of his former employer Morell. At last the years of confinement and denial claim the spent body of the Abbe, and he dies, giving to Dantes the half-burnt letter of Cardinal Spada, describing the location of treasures secreted on the Isle of Monte Cristo. In a gamble with death, Dantes takes the Abbe's place in the burial sack, which is cast into the sea. Dantes comes to the surface and attains the refuge of a hugh rock, from the summit of which he drinks in his liberty and exclaims from an unleashed soul, "THE WORLD IS MINE!" He is rescued by the smuggler ship La Amelia, and turns his eyes and hopes toward Monte Cristo, the grave of the buried treasure.

Reel No. 4

At the Isle of Monte Cristo Dantes escapes from the smuggler ship, and finds the hidden treasurers of the Spadas. Fabulous wealthy, with all the world before him he determines to find his friends and detect his enemies, to punish the evil and reward the good. Disguised as the Abbe Busoni, he returns to France and learns of his father's death and the plot of Fernand and

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Danglars. He arranges a meeting with Noirtier at the inn, who comes disguised as a peddler. Villefort, obtaining a suggestion of the Abbe's identity, follows Noirtier, and after a futile attempt to murder his half-brother, driven to despair at the threatened exposure of his villainy, commits suicide. It is then that Dantes, in the knowledge of his power and thrill of retribution, exclaims "One!" signifying that one of his enemies had met the fate his criminality deserved!

617

Reel No. 5

618 Dantes, in the guise of the Count of Monte Cristo, presents a letter of credit to Danglars, and meets his own benefactor, Morell, who is facing financial ruin and seeks monetary aid from Danglars. He assists Morell anonymously and quietly passes on to his other rewards and penalties. Dantes instigates the publication of a newspaper article to the effect that information given by Hadee, daughter of Fernand's late benefactor, now the ward of Monte Cristo, proves Comte de Morcerf, formerly Fernand, guilty of treachery to and the murder of his benefactor. Identified as the Count of Monte Cristo, a ball is given in Dantes' honor by Mercedes and Fernand. Monte Cristo recognizes Mercedes by the brooch he has given her in the long ago. Albert accuses Danglars, whose daughter is his fiancée, of responsibility for the article condemning Fernand, whom he believes to be his father. When, later, he ascertains the truth, he challenges

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Monte Cristo to a duel. Mercedes, who becomes aware of the challenge, informs Dantes that Albert is his son. On the duelling ground Dantes proclaims his identity, and Fernand, overwhelmed by the recognition, and fearful of the avenging Nemesis, withdraws into the woods, whence a moment later comes the report of a shot. Dantes announces "Two"! and challenges Danglars, thrusting his rapier into the heart of his last surviving enemy. With the relentless fury of vengeance incarnate, Dantes pronounces "Three"! wiping out the years' debt of treachery and torture. Turning to Mercedes he takes her in his arms; and Mercedes explains all the sad, happy mystery to the wondering boy when she says, "Albert, embrace your father!"

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Fate is generally just!

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I hereby certify that the foregoing is a true copy of the *description* filed with the application, as the same was received in this Office on the *Sixteenth* day of *December*, 1912, for the registration of the *Motion Picture Photoplay* entitled *Count of Monte Cristo*, entered in the name of *Famous Players Film Company, Times Building, Broadway & 42nd. St., New York, N. Y.*, copyright claimant, *which description remains in this Office.*

Defendant's Exhibit 7

IN WITNESS WHEREOF, the seal of this Office has been hereto affixed this *twelfth* day of *September*, 1914.

ERNEST BRUNCKEN,
(Seal) Assistant Register of Copyrights.

Defendant's Exhibit 5

623 "Monte Cristo" in five (5) Acts, known as French's (late Lacy's) Acting Edition, to be submitted upon the argument of this appeal.

Defendant's Exhibit 6

624 Volumes XII and XIII of the Theatre Complet being "Monte Cristo" Part I, "Monte Cristo" Part II, Le Comte de Morcerf, "Monte Cristo" Part III, Villefort "Monte Cristo" Part IV; being Alexandre Dumas' dramatization of his novel entitled "The Count of Monte Cristo," to be submitted upon the argument of this appeal.

Defendant's Exhibit 7

The English Translation of Part I, Acts I, II, III, IV and V; Part II, Acts I, II, III, IV and V; Part III, Acts I, II, III, IV and V; of Alexandre Dumas' dramatization of his said novel "The Count of Monte Cristo," to be submitted upon the argument of this appeal.

Defendant's Exhibit 8

Defendant's Exhibit # 8, marked for identification, and referred to in testimony of Marion Baker.

THE TIMES.

October 19th, 1868

ADELPHI THEATRE.

In its original form as a romance huge in dimensions and crammed with exciting incidents—the "Monte Cristo" of M. Alexandre Dumas 626 when first published in 1845, created a furor throughout Europe equal to, if not exceeding that previously caused by "Les Trois Mousquetaires" which with its two continuations, comprised a narrative of still more formidable length. A Chat-eau de Monte Cristo was built by the magnificent author of romance out of the profits of his successful toil and though this was sold at a huge loss years afterwards, the very record of the edifice is itself a monument of good fortune.

But the success of the story when reduced to a dramatic form has been by no means commensurate with that which it achieved in its pristine shape. A portion of the romance, wrought like 627 Shakespeares' "Henry IV into a bi-partite work was one of the pieces brought out by Dumas at the Theatre Historique of which he was both founder and chief dramatist. The theatre first in the order of that long line of playhouses on the Boulevard du Temple which looked so remarkable to visitors of old Paris, was in itself a failure and soon became the Opera house known as the Theatre Lyrique. This Opera house, like

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the Gaiete and some of the other theatres, survived as a property, the destruction of the line of buildings and is still represented by a splendid edifice on the Boulevard de Sébastopol. But as the Theatre Historique it merely stood the result of a transient illusion and its very existence in its dramatic capacity is by this time well nigh forgotten.

Whether in the Elizabethan age the three parts of Henry IV. were played on as many consecutive days and the entire work so delivered by instalments enchanted the inhabitants of old London, or whether they were brought out at longer intervals, the chronicles of our drama will not enable us to decide; but it is certain that continuance of a drama through two consecutive evenings by no means pleased the people of Paris twenty years ago.

The revolution of 1848 caused among other events of greater importance a migration to London of the entire troop of the Theatre Historique who brought with them the two parts of Monte Cristo as their novelty and the result proved that the unfortunate actors had merely escaped a political storm to encounter a theatrical hurrican. A host of English actors who had contemplated with indifference, the conversion of Drury Lane into an equestrian circus conceived of the old London stage was desecrated by a performance of foreign artists who were not horse riders and tumblers but bona fide actors and backed by a numerous army of mistaken patriots they created a "row" which if it had not been terminated by the speedy retreat of the com-

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pany might have vied in celebrity with the "P.O" Riots of Covent Garden.

As it was M. Mélarque and his associates were allowed to perform for a night or two unmolested at the St. James' where they made no impression at all and then went home, doubtless carrying with them an exalted notion of British wisdom and hospitality. The performance at the St. James' theatre must at any rate have convinced them (the patriots) that they had made all their noise for nothing and that if they had permitted "Monte Cristo" to be played quietly through at Drury Lane without let or hindrance, it would have soon slipped out of notice of its own accord.

In 1851 the latter half of the romance which had been previously left undramatized, was converted by its author into two pieces which were brought out at the Ambigu Comique in 2 consecutive months but the grasp of those on the memory has been anything but tenacious.

Save at some of the more obscure theatres, the notion of presenting "Monte Cristo" in English, does not seem to have occurred to any London manager. Hence the drama founded on the romance and produced on Saturday at the Adelphi with the title "Monte Cristo" may be regarded as a new experiment with an old subject. The reader will observe the correct spelling of the second word of this title, the omission of the intrusive "h" being an improvement effected by the English adapter.

It seems the destiny of "Monte Cristo" to have more or less to do with revolution or riot. The reception of the new piece at the Adelphi; which lasted for something like 5 mortal hours,

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more closely resembled the old fashioned noisy "damnation" which belonged to the days of our youth than any theatrical demonstration that has been made for many years. Hisses were abundant and there were points at which a hiss was not found to be sufficient expressive sign of dissatisfaction. At the scene of the interior of the inn kept by Caderousse, the roars of laughter intended to command serious attention were both frequent and violent, and malicious wags were not wanting to give to lines a meaning not intended by the author, and converted them into cues for renewed outbreaks of derision. And yet the condemnation was not formally complete. Sometimes a scene which had been received with a storm of ridicule was followed by another which was honoured with loud applause. Towards the close victory was with the "ayes" but this may be attributed to the fact that the lateness of the hour caused the retreat of many of the malcontents for the audience which was a goodly multitude at the commencement of the evening had dwindled into a comparatively scanty assembly before the fall of the curtain.

636 The checkered fortune of the English Monte Cristo may be fully accounted for by the nature of the play itself. By dint of mutilation, transposition and omissions, the adapter has tried to tell within the limits of a single long play, a subject which M. Dumas thought sufficient for four. There is ingenuity in some of the changes, but the result of a toil which must have been considerable, is a work so extremely disjointed and scenes so little connected with each other that while one portion is mercilessly condemned, an-

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other may without inconsistency be vociferously applauded.

The elevation of the Sailor Dantes into the Count Monte Cristo and his aptitude for assuming various characters, afford great opportunities for displaying remarkable versatility in Mr. Fechter, who as a frank, unsuspecting seaman, a bland but grave Abbe, and a thoroughly well bred aristocrat, shows himself fully equal to the many demands upon his talent. Similar opportunities are afforded to Mr. Benjamin Webster. Nortier, whom he represents is made, not the father, but the brother of Villefort and is endowed with the power of personation equal to that of Dantes.

As a Bonaparte conspirator, with a statuesque rigidity of manner he is so admirably made up that the very appearance of Mr. Webster was on Saturday a signal for loud and continuous applause and the surprise of the audience was renewed when the almost lifeless figure was suddenly converted into a semblance of an airy Parisian fop, and again into an inspector of prisons and a shrewd old social philosopher.

639 Rarely indeed is better acting seen than that of Messrs. Webster and Fechter in their heterogeneous drama. Let us add that two of the decorations, one representing the harbour of Marseilles and the Catalan village, the other the Chateau d'If are specimens of scenic art on a grand scale that fairly earned the shouts of applause by which the painter Mr. Craven, was summoned before the audience.

Nothing however can compensate for the unwieldiness of the play and its rambling unsatis-

factory plot, puzzling alike to those who have read the romance and to those who have not.

The latter will be in a state of blank ignorance as to the purport of that which passes before their eyes; the former will be embarrassed by the discrepancy between what they know and what they see. Abridgment would certainly be an operation in the right direction inasmuch as brevity is better than tediousness but we question whether any exercise of the symbolical pruning knife would bring the piece into a condition of even indifferent health. A patient who can only be healed by amputation of both arms and both legs at the joints of the shoulder and the hip must be in such a desperate way that if the head be removed also it will be no great matter.

Under the circumstances, the description of the plot of Monte Cristo would be altogether superfluous. The opinion of king Pyrrhus that some victories are equivalent to defeats may be extended in theatrical matters to victories in general, for there cannot be a victory without a battle and in the case of a play there ought to be no battle at all.

“DAILY TELEGRAPH” October 19th, 1868.

“MONTE CRISTO”

Something of the nature of fatality would appear to cling to Monte Cristo. A wicked fairy must have blighted at its birth the favorite bantling of the genius of M. Alexandre Dumas the

Elder with a malison which was destined to produce in after years an abundant crop of misfortunes. Monte Cristo never did any good to anybody save perhaps in the first instance to the proprietors of the *Constitutionnel*. The original novel which appeared in the columns of that journal was a prodigious success. Yet the benefit which its author derived from it, vast as was the remuneration he received, was ephemeral. It would seem as though all the fabled wealth of the mysterious Count, which he had discovered by lifting a stone at the 20th rock counting from the little eastern creek, had a faculty like the seals in the Arabian story of turning into dry ducks and drakes of the treasures of Monte Cristo. While the romance was in course of publication, the novelist was one of the heroes of the day. Spun out as his work was of intolerable length it still entranced thousands of daily readers. Journeymen barbers dreamt of inheriting the island, purchasing Greek slaves; giving away diamonds worth fifty thousand francs a piece and carrying bank notes for a million or so in the corner of the waistcoat pockets.

The seductive picture of the Count's immeasurable wealth touched one of the strongest points in the French character that of inordinate cupidity. The Count of Monte Cristo had drawn the big prize in the lottery. He had one the gros lot and concierges skimming their pot au feu and shabby little rentiers glozing over the thumb-nails in the cabinet de lecture, revelled in imagination in the boundless pleasures and the boundless power which boundless wealth is, quite er-

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roniously supposed to give. M. Dumas in fact had in the fascinating and ad captandum manner assumed as probable the theory which the philosophic Balzac in the "Peau de Chagrin" and the Recherche de l'absolu" had recognized as possible. But for these two works indeed and the same authors "Van trin and Ferragus," Monte Cristo might never have been written. Its com- position brought to M. Dumas huge sums. He was residing at St. Germain at the time about a quarter of a century since and relays of mounted couriers scoured the highway night and day between St. Germain and Paris. One set of messengers bearing the precious copy and another series conveying the equally precious proofs. Then from his literary profits M. Dumas built a fantastic villa of all styles of architecture and of none; which he named the Chateau de Monte Cristo. The ceilings were painted in fresco by celebrated artists, the walls were covered with gilding and plate glass, but we believe that the windows were never glazed and that the work done upon the roof did not extend to its being properly tiled in. The Chateau de Monte Cristo was a ruin before it was fit for human habitation, then it was mortgaged and sold and long since we believe it has been demolished.

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Some three years after this first collapse of Monte Cristism, M. Dumas, being interested in a new dramatic establishment called the Theatre Lyrique in Paris, brought out as a pendant to his "Reine Margot" a tremendous melodrama founded on "Monte Cristo." The performance of Margot extended over two nights, that of Monte Cristo covered three, but even with that

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scope and verge, the story did not advance beyond the escape of Edmond Dantes from the Chateau d'If. Though inordinately puffed the piece did not triumphantly be successful, nor did any material prosperity attend the production of subsequent instalments of the Monte Cristian epic under the successive names of Monte Cristo Part II. in which the action was brought down to the rescue from bankruptcy of the virtuous M. Morel of Villefort and of the Count de Morcerf. From all three elephantine inflections of dramatic episode, save the first, the British public until Saturday night, had been spared, but 20 years ago in the early revolutionary days of '48 a desperate attempt was made by a troop of Parisian actors including the renowned Melingue under the management of M. Hostein to persuade English play-goers into enduring Monte Cristo.

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The site for the experiment was ill chosen. It was Drury Lane Theatre which after a succession of bad seasons was then vacant. The time was still worse chosen. British drama was through convulsions abroad and chartist alarms at home in a very unprosperous condition. Numbers of native comedians were destitute of employment. They were intensely and perhaps not unnaturally irritated at the sight of a parcel of French mummors usurping the stage of the National Theatre and in their opposition to M. Holstein's enterprise, they found strange but ardent allies in the classes who habitually fill the galleries of our theatres.

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The revolution of February among other tumults to which it gave rise, had led to some deplorable riots in the northern and Eastern de-

partments of France where large numbers of English workmen were employed in forges, mines and factories. The French proletarians rose in a body and expelled the fancied intruders not without considerable violence and ill feeling. These ousted artisans came back to England and recounted their woes to their fellows and it may be assumed that no small proportion of the people who went to Drury Lane night after night and cheerfully paid their money to hoot Monte Cristo off the stage were sympathisers of the expelled factory hands. For the native actors were feeble folk and no formidable organization on their part to damn Monte Cristo was possible. The piece was damned most signally. It was supposed that the attempts made by the French Company to recite their parts were made in the French tongue but for ought that could be heard of their utterances the language of M. Hostein's troupe might have been Tamul or Syro Chaldaic.

While dumb show reigned on the stage, the most disgraceful uproars and horse play were rampant in the front of the Theatre. The artisans in the gallery kept up one continuous chorus of yells and vituperative rivalry while they were seconded by the steady hisses of cat-calls of the actors the larkly clerks and shop boys in the pit. The inmates of the boxes who had mainly come in with "orders" cried "order" and were either neutral or timidly applause. A small knot of English men of letters including the late Albert Smith, the late Angus B. Reach, Shirley Brooks and others, laudably anxious to cultivate feelings of international amity, courtesy and forbearance gallantly threw themselves into the breach and

in person and in the press, protested against the unfair course of condemning these long winded foreigners unheard. But the breach was too big to be stopped and the mal contents won the day.

It was literally a breach. We frequently hear of theatrical audiences threatening to tear up benches; but in the pit of the Theatre Royal, Drury Lane in 1848 and for the first time since the days of the "P.O." riots at Covent Garden, the benches were really torn up, broken to pieces and the fragments hurled about in every direction. The material violence done at Her Majesty's Theatre on the occasion of the great Lago beyond kicking through, by an illustrious personage, of the panels of the door leading from the omnibus box to the stage. In the case of Monte Cristo however, for a time it rained strawberry pottles and in a few instances aerolites in the form of ginger beer bottles descended from on high. The scene was eminently scandalous but the "noes" had it and Monte Cristo was doomed.

The police grew tired of interrupting fights and taking disorderly persons into custody. Some of the ring leaders were charged at Bow Street and there was a talk of indicting others for conspiracy but these prosecutions were wisely abandoned. At the end of a three nights campaign which may be defined as Moscow, Leipzig and Waterloo, for the last defeat was the worst the French people packed up their traps and went home. There was by the way a scene on board the ship in this version of Monte Cristo at Old Drury and the ship was intended to be practicable like her predecessor in the Tempest and her

successor in the Africaine. But the ship Monte Cristo was the sorriest tub conceivable. She would not answer her helm, her sails wouldn't reef and she was no good in her stays or out of her stays, so at last they shivered her timbers and the stage carpenters knocked her to pieces. This thrice ill omened Monte Cristo; this unwieldy and unmanageable ark of fiction, thrice convicted of impracticability, thrice burdened by the stigma of collapse was produced last Saturday night at the Adelphi Theatre in the form of a melodrama comprising a prologue and four acts. If the reader can fancy to himself some irresponsible despot who possesses an anatomical museum calling in the Professor Owen of the period and commanding him to construct from the bones of a plesiosarus and ichthyosaurus, an iguandon and a colossal elk, the skeleton of an arbitrary animal which shall have some of the form of a camel but shall not be larger than a race horse, then he may form some idea of the painful task of the playwright who from Parts 1, 2, 3 and 4 of Monte Cristo the Interminable has endeavoured to erect a compact and homogeneous drama which shall contain all the striking features of M. Dumas' quadruple epopee with as many more striking scenes and situations as his own ingenuity may suggest. The playwright has done his best, the product is neither compact nor homogeneous. It is continuous but not cohesive. It unfolds a tail as long as that of the great sea serpent but there is no end to the tail. The performance of Monte Cristo on Saturday which commenced at 7.45 only ended at one next morning. Five hours and a quarter are preferable it may be said to 18

hours which was the time consumed by the first two parts of Monte Cristo in Paris but into the five hours and a quarter on Saturday there had been an attempt to pack all the incidents and all the character, not only of parts 1 and 2 but of parts 3 and 4 into a single part which in itself was thrice as long as it should have been. We do not object to compression the audience indeed on Saturday sighed for condensation, wept for abridgment and clamoured for an abstract of the case but the system on which the Adelphi version of Monte Cristo has been constructed is more of the nature of a hydraulic pressure as applied to forcing a quart of liquor into a bottle which only holds a pint. The result was, that to use an Americanism, the contents of the outraged vessel "slopped over" and the vessel itself nearly burst.

The real plot of M. Dumas' story is singularly enough very simple and judiciously treated it might form the basis of a most stirring 3 act melodrama, full of startling situation. Some alterations in the original scheme of incidents have been made by the Adelphi adapter and the story would appear to run thus. Edmond Dantes (Mr. Fechter) a young and generous French seaman is in the year 1815 mate of a merchant vessel called "The Pharaoh" bound from Smyrna to Marseilles and owned by a M. Morel of that seaport. On the voyage between Naples and Marseilles the Captain of the vessel dies and in his last moments enjoins Dantes on whom the command of the Ship will devolve, to go out of his course and put in at Porte Ferrago in the Island of Elba for the purpose of receiving a certain

communication. This injunction Dantes obeys and at Elba he receives from the exiled Emperor Napoleon, a letter, which on his arrival at Marseilles, he is to hand to a certain M. Noirtier (Mr. Webster). Dantes is affianced to Mercedes (Miss Carlotta Leclercq) a beautiful Catalan peasant girl who the Adelphi adapter has committed the gross blunder of assuming that prior to the beginning of the drama Mercedes has been seduced by Dantes and has had a son by him. This might do in Provence or in Wales but it is clearly out of place with a London audience. Now Mercedes is beloved by a ruffianly Catalan fisherman named Fernand (Mr. Arthur Stirling) who of course hates Dantes, while the mate of the "Pharoah" is otherwise detested by Danglars (Mr. R. Phillips) on purely professional grounds. These worthies, when the Pharoah reaches Marseilles, conspire in denouncing Dantes as the carrier of treasonable correspondence to M. de Villefort the resident procureur du Roi under the Bourbon Government. Dantes has meanwhile had an interview with Noirtier and has promised to hand him the Emperor's letter which is locked up in his cabin on board. On the receipt of the denunciation conveyed in a disguised handwriting, the Procureur du Roi causes Dantes to be "preventively" arrested and interrogates him in his cabinet. The Police agents have previously boarded Dantes ship; broken up the cabin and seized the letter. M. de Villefort is so pleased with the young man's frankness and candour that believing he has only erred through respect for the orders of his dying captain,—he discharges him upon his promise to appear whenever called upon,

but no sooner has Dantes quitted the judicial sanctum on his way to the tavern of the Reserve where a festival held in honour of his coming marriage with Mercedes is to take place, than Noirtier enters the Procureur's presence. He the Bonapartist conspirator, turns out to be the elder brother of the Bourbonist functionary and that functionary has just unwillingly issued orders on the strength of a report from Paris for the conspirators arrest. Noirtier compels his brother to permit him to enter his dressing room where he quickly assumes the garb of a dandy of the epoch and in this disguise passes undetected through the ranks of the very agents who are on the look out for him, his brother not daring to interfere. But as soon as the conspirator is at liberty, the Procureur du Roi remembers that there is another person at large who knows that conspirator as Noirtier. Dantes is the custodian of a secret which might embarrass M. de Villefort and Dantes must be got rid of. So a fresh warrant of arrest is made out and the merry wedding party at the Reserve is rudely interrupted by a body of gendarmes who carry off Dantes to the Secret dungeons of the Chateau d'If, the rock bound fortress at the entrance of the port of Marseilles. This ends the prologue.

There should either not have been a prologue at all in the Adelphi drama, for the whole story of Dantes difficulties might have been told in 5 minutes or else this prologue should have been made Act the first of the play.

Eighteen years are supposed to have elapsed between the prologue and the beginning of the first act. We then find that Fernand from a fish-

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erman in the Catalan village has risen to be a general in the French army and a Peer of France and that he bears the title of Count de Morcerf. He continues in love with Mercedes who though still passionately in love with Dantes imagines him to be dead and is willing to become Countess de Morcerf for the sake of her illegitimate son Albert, (Mrs. Alfred Mellon) a student at the School of St. Cyr whom the accommodating Fernand has promised to adopt. She insists however that it shall be proved that Dantes is dead, a consummation also devoutly wished for by Danglars who in the whirligig of fortune has become a millionaire banker in Paris and also by Villefort who has risen to the very top of his profession and is on the eve of being appointed Minister of Justice. Villefort indeed is certain that Dantes is alive, one of his own prison inspectors named Fouilliard has told him so, and on summoning Fouilliard to give further information he is again confronted by the dreaded brother Noirtier who has murdered Fouilliard in a "difficulty," has assumed the deceased gentleman's clothes and in his official capacity has visited the Chateau d'If and ascertained that Dantes is still in the subterranean dungeon in which he has languished since the year '15. By dint of threats he makes Villefort promise that Dantes shall be liberated and shall be produced at an Inn near the Pont du Gard at the end of a month when he Noirtier will also be present. But no sooner has he taken his departure than the wicked Villefort posts down to Marseilles for the express purpose of killing Dantes. Fancy the Lord Chief Justice of the Queen's Bench taking the train down to Portland in order to burke the convict Roupell.

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From Paris the audience are duly transported to Marseilles. In an underground hole in the Chateau d'If are visible two ragged captives, one Dantes, the other a certain Abbé Faria (Mr. Stuart) who has been confined for an equal period. They should occupy separate cells but by an unwearied labor at amateur masonry, Dantes has succeeded in establishing a communication between the two dungeons. Moreover the sailor Sheppard for popping his head through a hole in the ceiling of his dungeon which looks out upon the parapet overhanging the sea, and after gaging the sentinel, jumping into the Gulf of Lyons and effecting his escape. Faria who is very ill indeed to begin with, informs Dantes of whom he has grown immensely fond in prison, that he is the possessor of enormous wealth in gold silver and jewels which has been so long covertured by the Borgias and which is concealed beneath a rock in the Island of Monte Cristo on the coast of Tuscany. He makes Dantes his heir and after a series of personal narratives, which on Saturday aroused the justifiable ire of a very patient and good natured gallery, he gives up the ghost, to the great joy and contentment of all who hear his ultimate groan. It appears to be the custom at the Chateau d'If to thrust the bodies of dead prisoners into a sack and pitch them into the sea and on this eventuality Dantes constructs a little plan. But meanwhile that atrocious Villefort has appeared on the battlements above accompanied by the commander of the fortress. The sentinel expresses an opinion that No. 17. (Dantes cell) is about to make his

escape for he struck his foot on the flags over the dungeon in question and a remarkably hollow sound has been given forth. The wily Villefort at once sees his way to getting rid of Dantes. He advises the sentinel to allow the prisoner to continue his attempt at escape and as soon as he has removed the last stone and pops his head through the hole, to take aim with his musket and blow his brains out. This order, be it remembered is given by the high legal functionary in France in the year 1839 under the constitutional government of Louis Phillippe. But, *pendente lite*, Faria has made a good end if it. The gaolers delighted, tell the audience that the prosy old man is dead and descend to his cell to perform the customary rapid act of undertaking. But Dantes has contrived to substitute his own living frame for the corpse of his friend. He is sewn up in the sack, *he* is carried on the stretcher to the platform and *he* is chucked off the battlement into the sea. But he comes up again to the surface smiling, not in any way hurt by the craggy shingles and boulders which encompass the Chateau d'If. There is a clever "sink and fly" by means of which the base of the tower is shown with Dantes swimming, and a flash electric light shines upon him. Liberty, wealth and power are all his and the act the first, which should be act the second, ends.

In Act the second we are shown the Inn at the Pont du Gard kept by Caderousse (Mr. Belmore) a drunken tipster formerly of Marseilles and Carconte his wife (Mrs. Leigh Murray). Caderousse is an inebriate but benevolent victualler, Carconte is an avaricious and murderous hag. To them en-

ters Albert de Morcerf who while riding across country has picked up a priest in cossack and shovel hat, giving himself out to be the Abbe Busoni but who is no other than Edmond Dantes, late of the Chateau d'If. Why he should so disguise himself instead of going to Paris and ventilating his wrongs through the opposition press passes human comprehension. The Abbé has taking a liking to Albert, the likeliest thing in the world when we remember that Albert is played by the charming Mrs. Mellon and Albert has taken a liking to the Abbé Busoni, an affinity not uncommon when Abbés are played by Mr. Fechter. They have known each other only 5 minutes but like the 2 German ladies in the "Rovers" they forthwith "swear an eternal friendship." Albert goes away and then Dantes, questioning Caderousse as to his former life at Marseilles and satisfied that he has not been an enemy of his, gives him a diamond worth fifty thousand francs. Then there is a storm of thunder and lightning and the Abbé, after hearing some unpleasant communications relative to the conduct of Fernand, Danglars and Mercedes, says that he wants "air" and goes out for a little walk. Shortly afterwards appears on the stage that indefatigable Mr. Benjamin Webster; alias Noirtier, alias "The Beau," alias Fouillard, deceased, inspector of prisons, disguised, no man can tell why, as Solomon Van Gripp, a Jew Pedlar. He is going to the fair at Beaucaire with a pack full of jewelry and the long cheffering conversation which he held with Caderousse and his spouse, provoked the audience on Saturday to very vehement hissing and to cries of "Get on," "more action" and the like. At last he goes to bed. Carconte immediately

682 suggests that it would be highly expedient to rob him of his valuables, shooting him through the head as a precautionary measure. The formerly intoxicated but now reformed Caderousse objects to this but a little plan is vigorously seconded by M. de Villefort, who as usual has arrived poste haste from Paris with a view to arresting both Solomon Van Gripp and the Abbé Busoni. Caderousse still protesting against the robbery and murder of the pedlar, he is garrotted by the Minister of Grace and Justice elect, and gagged by his own wife who in true Lady Macbeth fashion, ascends to the lodger's apartment to do the deed, but her pistol misses fire. She is "quoted" 683 downstairs like the Edward Shovelboard" by the indignant Noirtier who has been awake the whole time and has overheard all the conversation affecting him. He comes downstairs in his shirt and trousers and informs his bad brother that he has had enough of this kind of thing and that he intends to turn the tables by giving him into custody for an attempt to murder. There is a great disturbance. Suddenly Dantes or the Abbé 684 Busoni, comes back from his walk and withers Villefort with a glance. That depraved scoundrel of the legal profession shrinks up in rage and despair and seizing a carving knife, stabs himself in the most exemplary manner. Down he goes dead as Queen Anne. "One" exclaims Edmond Dantes, meaning that the punishment of one of the three naughty people of the drama, Fernand, Danglars and Villefort has been accomplished. The situation was a good one and the placable audience loudly applauded end of act second.

Act the third presents an odd mixture of improbability and equivoque. Dantes appears as the incredibly rich Count de Monte Cristo, the wonder and the cynosure of Parisian society. He appears in the gilded salons of the Count de Morcerf. Mercedes true to her womanly instincts, recognizes him at once and is rather sorry for what she has done. Neither Fernand nor Danglars however has the slightest suspicion of the identity of the Count de Monte Cristo and their quondam familiar acquaintance Dantes. But 686 Noirtier alias The Beau, alias Fouillard; deceased alias Solomon Van Gripp, who is now the editor of the Paris daily paper "L'Impartial" together with Caderousse, promoted to be a strictly temperate footman moving in the best circles, knows all about the mystery. In pursuance of his plan for punishing the guilty, Monte Cristo causes to be inserted in L'Impartial, a paragraph setting forth how the Count de Morcerf is perhaps the biggest scoundrel ever known since the days of Jonathon Wild. How when resigning under a cloud at Jamisca on the coast of 687 Albania, he murdered for a large pecuniary bribe his benefactor, one Ali, a gentleman of the Mahometan persuasion. On the strength of this paragraph, the banker Danglars breaks off the intended match between his daughter and Albert de Morcerf. Albert in a rage challenges the editor of "L'Impartial" to fight a duel. The cunning Mr. Webster, knowing that editors of newspapers don't fight, refers the irate Mrs. Mellen to Mr. Fechter, otherwise the Count de Monte Cristo who coolly avows that the story is true and owns that he caused it to be inserted in "L'Impartial,"

and is prepared to stand the consequences. Whereupon, Albert who is as plucky as the late Thomas Sayers, flies at Monte Cristo's throat; but the Count, an old bruiser, "heavily grasses" the raw stripling and is about to inform him that it will afford the Count the greatest pleasure to run M. de Morcerf Jun through the stomach on the morrow before breakfast in the Forrest of Vinciennes when the Countess de Morcerf, née Mercedes the Catalan, appears fortuitously in an open doorway and informs the Count de Monte 689 Cristo that Albert is his son. This situation should have ended the piece. Nothing would have been easier than for Danglars to have been kicked downstairs by Noirtier, while Fernand was taken into custody by two sergents de Ville for murdering the Mahometan gentleman in Albania. He might have poisoned himself with the strychnine he always carried about in his signet ring before the agents got him to the Depot of the Prefecture in the Rue de Jerusalem and then Mercedes might have married Monte Cristo tout de bon and the reclaimed toper Caderousse been 690 rewarded with a Bureau de tabac, while all the surviving dramatis personæ might have bound themselves forever to subscribe to and advertise in "L'Impartial" under the able editorship of Mr. Benjamin Webster. Instead of which as the Judge remarked in the celebrated duck-stealing case, there is a fourth act which consists of an anti climax, a post climax, an abortive duel, and a "combat of two" partly borrowed from the Corsican Brothers and partly from Richardson's Show, one suicide and a ridiculous scene at Mar-seilles in which a new "Pharoah" is equipped by

Monte Cristo who dubs himself the "spectre Captain," for what purpose the seven wise men of Greece may know.

Such is the story of Monte Cristo, a theme tedious in its exordium, dreary in its argument and bungling in its peroration. On this essentially wooden and intractable piece an immensity of good acting has been thrown away. There is not one earthly reason why Mr. Fechter as Dantes or Mr. Webster as Noirtier should adopt 692 any of the 4 disguises which they respectively assume. Mt. Fechter in fact changes his dress 6 times and Mr. Webster 5 times in the course of the piece and these mutations of costume are well high reminiscent of a "trick act" at Astley's but each travestissement affords each of these accomplished actors an opportunity to display the nicest shade of histrionic realism and artistic appreciation. Mr. Webster's part is particularly an unthankful one. After the prologue he is a conspirator without a conspiracy, a fugitive without a cause, and an outlaw without a motive. That 693 which he did for the Bonapartists in 1815 cannot surely concern his relations with the Orleans family in 1833, but his make up as to face and costume is in every respect perfect. Mr. Fechter acts a sailor, a prisoner, a priest and a gentleman to the life and his sympathetic style of acting has some scope in his scenes with Albert. But with the extraordinary perversity of the adapter in converting Mercedes into a person for whom we can have neither sympathy nor respect, has not only robbed that excellent actress—Miss Carlotta Leclercq of the part to which she was entitled, that of a heroine, but has deprived Mr.

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Fechter of nearly all the love making in which he is so excellent and proficient. Mrs. Alfred Mellon who ought not to wear the uniform of a cadet of St. Cyr when she has obtained a lieutenant's commission and served in Africa, was graceful, eloquent and pathetic, bland passionate and affable as the epitaph puts it, as Albert. It is the pleasantest part in the piece and Mrs. Mellon filled it most pleasantly. Mr. Stuart declaiming sonorously as usual was as unconscionable a time in dieing as King Charles II. of blessed memory, but unlike that courteous moribund, he omitted to apologize to the audience for his superfluous and most verbose lagging on the stage of life. Mr. Belmore played Caderousse with infinite care and forethought and with much dry humour. Especially he must be commended for not tearing the passion of drunkenness to tatters. Mrs. Leigh Murray merits warm praise for the intensity with which she rendered the repulsive part of the innkeepers wife. The scenery in Monte Cristo was elaborate but artistically considered mediocre and really we have had enough of the silly and vicious practice of calling scene painters upon the stage in the middle of a performance. The costumes of Mr. Webster and Mr. Fechter were beyond criticism they were perfection. Mr. Stirling's appearance as the Catalan fisherman was admirable but he should be told that the uniform he wears in the drama is that not of a general but of a marshal of France and that a French marshall would as soon think of appearing in "full fig" at an evening party at his own house as the Lord Chancellor would think of attending the Stalls of the new Adelphi in his

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gold decked robe and his full bottomed wig. Miss Carlotta Leclercq as Mercedes was fascinating. It is a pity she could not keep her striped stockings, short skirt and dainty capuchon throughout the play. As the Countess de Morcerf she occupied a perfectly false position and her sweetness and pathos through no fault of a capital actress, were wasted on the desert air.

Monte Cristo was hissed where it deserved hooting and applauded where it merited approbation. It will never we are afraid be a thoroughly successful piece, first because it is destitute of a girl heroine; a girl to be wooed and won and next because it is from end to end a tissue of glaring improbabilities at which the gorge of the most hardened frequenter of melodrama might rise. It being remembered that Dantes was incarcerated in the Chateau d'If during Napoleon's exile at Elba and that the Gendarmes publicly announced the fact, it is historically certain that the Marseillais would have demanded and obtained his liberation whenever the Bourbons were overthrown. He might have been re-arrested after the 100 days but considering the inquisitorial criticism of the acts of the Governments at the Restoration by the opposition newspapers between 1810 and 1830 it is impossible that any political prisoner could have languished through all those years in a dungeon without being brought to trial.

There was besides the Revolution of 1830 but further comment on this becomes useless when we remember that the last political captive confined in the Chateau d'If was that Honoré Gabriel Riquette who was subsequently famous as

the Comte de Mirabeau and who was immured there nearly one hundred years ago.

If Monte Cristo is to be acted for any considerable length of time, it will be necessary not only to make large excisions but entirely to remodel the drama and to suppress the wearisome prologue and the superfluous 4th act.

701 ADELPHI THEATRE.

"MORNING ADVERTISER"

October 19th, 1868

702 The winter season at this theatre commenced on Saturday night with an entirely new and original version on Alexander Dumas' drama of "Monte Cristo" and in spite of really good acting on the part of many of the performers as well as of very beautiful scenery, the entirely new and original version had a very narrow escape from decided condemnation. The version consists of a prologue and four acts and it occupied within 2 or 3 minutes of five hours in its presentation. Indeed when at half past 11 there were still 2 acts to come, it almost seemed that the continuation would be deferred until Monday and one began to think of those Hindoo and Burmese drama which require an entire week for their complete performance. Something like this prolonged representation has occurred with the drama of "Monte Cristo" for when it was first produced at Paris in the year 1848 its performance took 2 nights and the caricaturists of

704 that gay city represented those who went in young to see the first act as having grown grey and venerable by the time the curtain fell on the final scene. Another incident connected with the history of this drama may be mentioned. As the revolution of 1848 destroyed the glories of M. Dumas' Theatre Historique the drama was in the same year transferred to Drury Lane, at that time under the management of M. Jullien. But Monte Cristo was a failure within a week. On the first night there was a disgraceful riot. The galleries and pit were furious at what they deemed the desecration of the National Theatre. Benches were torn up, nobody would listen to the actors, derisive placards were exhibited in the boxes and the ring leaders of the riot found themselves in the police cells. Those who were acquainted with the original drama will see that the version now produced at the Adelphi differs in some respects from it. The prologue opens with the charming view of the Catalan Village and Harbour and City of Marseilles and with the return of the ship "Pharon." Edmond Dantes (Mr. Fechter) is chief mate has taken the place of the captain who has died during the voyage. Dantes is the bearer of a mysterious letter from the Emperor Napoleon who is at Elba, is waited for by the equally mysterious Noirtier (Mr. Webster). Danglars the revengeful supercargo of the "Pharon" (Mr. Phillips) and Fernan (Mr. Arthur Stirling) the jealous Catalonian cousin of Mercedes (Miss Carlotta Leclercq) by giving notice to Villefort the Procureur du Roi (Mr. Ashley) of the existence of this letter procure the arrest of Dantes and thus prevent his mar-

riage which was on the point of taking place. This ends the prologue and the good acting of Miss Carlotta Leclercq and Messrs Fechter and Webster received deserved applause and they were all recalled.

When the first act opens 18 years are supposed to have elapsed. Fernand, as the price of some treacherous work done in Greece, has become immensely wealthy is Count de Morcerf and a peer of France. Dantes has been all these years in the deepest dungeons of the Chateau d'If and
 707 Villefort who has kept him there, has become Minister of Justice. Believing Dantes is dead Mercedes marries Morcerf. We are then introduced to the dungeons where Dantes and Faria (Mr. Stuart) are confined. As a mere piece of scenery this was effective and impressive but the long dialogue between the two prisoners in which the events already known to the spectators are all gone over again, fairly wearied the audience and there were cries of "Speak out," "Come to the last act" and "Time, time" and other unmistakable indications of impatience. Faria after
 708 telling Dantes of the concealed treasure of the Borgias in the Island of Monte Cristo dies. Dantes takes his place in the sack and is thrown into the sea instead of the dead prisoner. This was done in such a manner as to provoke considerable mirth and the act closed with Dantes reappear-
 709 ance from the bottom of the sea, he having in some wonderful way, released himself from the double shotted shroud. The second act went still more slowly. This was at the Inn of the Pont du Gard where there is more wearisome dialogue which does not advance the

action of the piece between Caderousse (Mr. Belmore) and his shrewd wife (Mrs. Leigh Murray). Even—the excellent acting of Mr. Belmore as the eccentric and wine drinking landlord failed to keep the house quiet and when Mrs. Leigh Murray announced her intention of going to bed, there were general expressions of approval.

The entry of the villianous but conscience stricken Villefort was greeted with cries of "Shall you belong sir"—and the curtain fell to the sound of pretty general hissing.

The third and fourth acts were decided improvements on their predecessors. In them Mr. Fechter appeared as Monte Cristo and Mr. Webster as a newspaper editor. Monte Cristo exposes the villainy of Fernand and inflicts vengeance on Danglars who by fraudulent means has become a wealthy capitalist.

The Grand Saloon and conservatory in the Mansion of the Count de Morcerf in the third act is quite a gem in scenic art, light, and gracefully picturesque in every respect.

The Forest of Vincennes too, in the fourth act was good and the drama wound up by disclosing the scene of the prologue when all the deserving people are made happy. The dialogue of the last two acts was in marked contract to that of those which went before them with the exception of the prologue but notwithstanding its excellence there was but faint applause when the curtain fell. Mr. Webster personates four parts in the course of the drama and the rapidity with which he changed his costumes and the individuality which he threw into each character earned and received

712

Defendant's Exhibits 9 and 10

general applause. Mr. Fechter had also 4 characters allotted to him and it is almost unnecessary to say that he was at home in all of them whether as the frankhearted sailor Dantes, the grave abbé, the stately and courteous Count or the "spahi" captain.

Mrs. Alfred Mellon as the young Count de Morcerf was all that could be desired and her graphic and telling descriptions of the rescue on the battlefield was one of the great hits of the evening. The other characters were generally speaking, well sustained.

713

From what we have said it will be inferred that if Monte Cristo at the Adelphi is to maintain its place there it must be remorselessly cut down so as to bring the incidents closer together. If this is done there is no reason so far as we can see why it should not have as long a run as the "Dukes' Motto" had some three years ago at the Lyceum, to which piece by the variety of its incidents and the uncertainty up to the last moment how all would terminate. Monte Cristo has or might be made to have a considerable resemblance without in any way being open to the charge of repeating the same incidents or the same plot.

714

Defendant's Exhibits 9 and 10

Pictorial Posters of Scenes from play "Monte Cristo", to be submitted upon the argument of this appeal.

715

Defendant's Exhibits 11, 12, 13, 14, 15, 16, 17, 18, 19

Flashlight photographs of different scenes of play "Monte Cristo" to be submitted upon the argument of this appeal.

Defendant's Exhibit 20

Copy of play "Monte Cristo" referred to in testimony of Herbert Trendell to be submitted upon the argument of this appeal.

716

Defendant's Exhibit 21

6 & 7 Vict., Chap. LXVIII—An Act for regulating Theatres. (22d August 1843.)

"XII. And be it enacted, That One Copy of every new Stage Play, and of every new Act, Scene or other Part added to any old Stage Play, and of every new Part added or Epilogue, and of every new Part added to an old Prologue or Epilogue, intended to be produced and acted for Hire at any Theatre in Great Britian, shall be sent to the Lord Chamberlain of Her Majesty's Household for the Time being, Seven Days at least before the first acting or presenting thereof, with an Account of the Theatre where and the Time when the same is intended to be first acted or presented, signed by the Master or Manager, or One of the Masters or Mangers, of such Theatre; and during the said Seven Days no Person shall for Hire act or present the same, or cause the same to be acted

717

Defendant's Exhibit 22

or presented; and in case the Lord Chamberlain, either before or after the Expiration of the said Period of Seven Days, shall disallow any Play, or any Act, Scene, or Part thereof, or any Prologue or Epilogue, or any Part thereof, it shall not be lawful for any person to act or present the same, or cause the same to be acted or presented, contrary to such Disallowance.

719 XIII. And be it enacted, That it shall be lawful for the Lord Chamberlain to charge such Fees for the Examination of the Plays, Prologues, and Epilogues, or Parts thereof, which shall be sent to him for Examination, as to him from Time to Time shall seem fit, according to a Scale which shall be fixed by him, such Fee not being in any Case more than Two Guineas, and such Fees shall be paid at the Time when such Play, Prologues, and Epilogues, or Parts thereof, shall be sent to the Lord Chamberlain; and the said Period of Seven Days shall not begin to run in any Case until the said Fee shall have been paid to the Lord Chamberlain, or to some officer deputed by him to receive the same."

Defendant's Exhibit 22

720 *Referred to in testimony of Herbert Trendell at page 127*

STAGE PLAY LICENSE

Lord Chamberlain's Office

I, the Lord Chamberlain of the Kings' Household for the time being, do by virtue of my office

Defendant's Exhibit 22

721

and in pursuance of powers given to me by the Act of Parliament for regulating Theatres, 6 and 7 Victoria Cap. 68 Section 12; Allow the Performance of a new Stage Play, of which a copy has been submitted to me by you, being a
in Acts, entitled

with the exception of all Words and Passages which are specified in the endorsement of this License and without any further variations whatsoever.

Give under my hand this
19

day of 722

Lord Chamberlain.

To the Manager of the

On the back of the above license:

Memo. The particular attention of the Management is called to the following Regulations, which refer to all Stage Plays licensed by the Lord Chamberlain. The strict observance of these Regulations is to be considered as the condition upon which the license is signed.

723 Notice of the change of title of a piece to be given to the Examiner of Plays.

No profanity or impropriety of language to be permitted on the stage.

No indecency of dress, dance, or gesture to be permitted on the stage.

No offensive personalities or representations of living persons to be permitted on the stage, nor anything calculated to produce riot or breach of the peace.

Defendant's Exhibit 23

5 & 6 Vict., Chap. XLV—An Act to amend the Law of Copyright. (1st July 1842.)

725 “II. And be it enacted. That in the Construction of this Act the Word ‘Book’ shall be construed to mean and include every Volume, Part or Division of a Volume, Pamphlet, Sheet of Letter-press, Sheet of Music, Map, Chart, or Plan separately published; that the Words ‘Dramatic Piece’ shall be construed to mean and include every Tragedy, Comedy, Play, Opera, Farce, or other scenic, musical, or dramatic Entertainment; that the Word ‘Copyright’ shall be construed to mean the sole and exclusive Liberty of printing or otherwise multiplying Copies of any Subject to which the said Word is herein applied; that the Words ‘personal Representative’ shall be construed to mean and include every Executor, Administrator, and next of Kin entitled to Administration; that the Word ‘Assign’ shall be construed to mean and include every Person in whom the Interest of an Author in Copyright shall be vested, whether derived from such Author before or after the Publication of any Book, and whether acquired by Sale, Gift, Bequest, or by Operation of Law, or otherwise; that the Words ‘British Dominions’ shall be construed to mean and include all Parts of the United Kingdoms, of Great Britain and Ireland, the Islands of Jersey and Guernsey, all Parts of the East and West Indies, and all the Colonies, Settlements, and Possessions of the Crown which now are or hereafter may be acquired; and that whenever in this Act, in describing any Person, Matter, or Thing, the Word import and singu-

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Defendant's Exhibit 23

lar Number or the Masculine Gender only is used, the same shall be understood to include and to be applied to several persons as well as one Person, and Females as well as Males, and several Matters or Things as well as one Matter or Thing, respectively, unless there shall be something in the Subject or Context repugnant to such Construction.

728 “III. And be it enacted, That the Copyright in every Book which shall after the passing of this Act be published in the Lifetime of its Author, shall endure for the natural Life of such Author, and for the further Term of Seven Years, commencing at the Time of his Death, and shall be the Property of such Author and his Assigns Provided always, that if the said Term of Seven Years shall expire before the End of Forty-two Years from the first publication of such Book, the Copyright shall in that Case endure for such Period of Forty-two Years; and that the Copyright in every Book which shall be published after the Death of its Author shall endure for the Term of Forty-two Years from the first publication thereof, and shall be the Property of the Proprietor of the Author's Manuscript from which such Book shall be first published, and his Assigns.

729

“VI. And be it enacted, That a printed Copy of the whole of every book which shall be published after the passing of this Act, together with all Maps, Prints, or other Engravings belonging thereto, finished and coloured in the same Manner as the best Copies of the same shall be published, and also of any second or subsequent Edition which shall be so published with any

731 Additions or Alterations, whether the same shall be in Letter Press, or in the Maps, Prints, or other Engravings belonging thereto, and whether the first Edition of such Book shall have been published before or after the passing of this Act, and also of any second or subsequent Edition of every Book of which the first or some preceding Edition shall not have been delivered for the Use of the British Museum, bound, sewed, or stitched together, and upon the best Paper on which the same shall be printed, shall, within One Calendar Month after the Day on which any such Book shall first be sold, published, or offered for Sale within the Bills of Mortality, or within Three Calendar Months if the same shall first be sold, published, or offered for Sale in any other part of the United Kingdom, or within Twelve Calendar Months after the same shall first be sold, published, or offered for Sale in any other part of the British Dominions, be delivered, on behalf of the Publisher thereof, at the British Museum."

732 "XX. And whereas an Act was passed in the Third Year of the Reign of His late Majesty, to amend the Law relating to Dramatic Literary Property, and it is expedient to extend the Term of the sole Liberty of representing Dramatic Pieces given by that Act to the full Time by this Act provided for the Continuance of Copyright: And whereas it is expedient to extend to Musical Compositions the Benefits of that Act, and also of this Act; be it therefore enacted, That the Provisions of the said Act of His late Majesty, and of this Act, shall apply to Musical Compositions, and that the sole Liberty of representing or performing, or causing or permitting to be

734 represented or performed, any Dramatic Piece or Musical Composition, shall endure and be the property of the Author thereof, and his Assigns, for the Term in this Act provided for the Duration of Copyright in Books; and the Provisions herein-before enacted in respect of the Property of such Copyright, and of registering the same, shall apply to the Liberty of representing or performing any Dramatic Piece or Musical Composition, as if the same were herein expressly re-enacted and applied thereto, save and except that the first public Representation or Performance of any Dramatic Piece or Musical Composition shall be deemed equivalent, in the Construction of this Act, to the first Publication of any Book; Provided always, that in case of any Dramatic Piece or Musical Composition in Manuscript, it shall be sufficient for the Person having the sole Liberty of representing or performing, or causing to be represented or performed the same, to register only the Title thereof, the Name and Place of Abode of the Author or Composer thereof, the Name and Place of Abode of the Proprietor thereof, and the Time and Place of its first Representation or Performance."

Defendant's Exhibit 23-A

Depositions of Julius Victor Scholderer and Marion Baker; read into the record, see pp. ~~87~~⁸⁸ to ~~88~~⁸⁹ inclusive of this record.

Defendant's Exhibit 24

Director's Scenario & Stage Instructions

THE COUNT OF MONTE CRISTO.**REEL 1**

Close up of Bosworth & Besserer on Rocks.

(1)

737 Dock.—Crowd of people. Clark gives letter to captain.

(2)

Captain's Cabin.—Captain in berth. Tom gives him medicine & exits.

(3)

Cabin.—Captain in berth. Bosworth enters, gives him paper & ring. (Cut-in Letter No. 1) Captain dies.

(4) (6)

738 Cut-in Tom looking thru cabin window, as Captain gives Bos. letter.

(5)

Companionway of Ship.—Several sailors & Tom waiting. Bos. comes from cabin, announces death of Capt. Tom tries to go down. Bos. stops him. Tom exits.

(7)

Napoleon's Room.—Bos. enters. Delivers letter to Hernandez who exits.

(8)

Hernandez gives letter to Bos. who exits.
(9)

The Beach.—Crowd of people. Sailors land from boats. Bos. meets Clark. Exits with Cogley.
(10)

Morrell's Office.—Cogley & Bos. go into office.
(11)

Int. of Office.—Cogley & Bos. enter, go to desk. 740
Tom enters, makes charges against Bos. Bos. exits.
(12)

Dantes' Father's Attic.—Hutchinson alone & expectant. Bos. enters. Embraces father.
(13)

Ext. Morrell's Office.—Tom enters, meets Hernandez, both exit.
(14)

The Reserve Inn.—Tom & Hernandez enter. 741
Hayward serves drinks. Hernandez exits.
(15)

Dantes' Home.—Bos. & Hutchinson. Hernandez enters, greets Bos. Cogley enters & gives him paper. Hernandez exits. Bos. exits.
(16)

Reserve Inn.—Tom alone. Hernandez enters, tells of Bosworth's promotion.
(17)

Defendant's Exhibit 24

Mercedes' Home.—Garcia & Besserer making love. Bos. enters, embraces Besserer. Garcia exits. Bos. & Besserer go into house.

(18)

Reserve Inn.—Tom & Hernandez at table.—Garcia enters. Hernandez calls him, he sits, talking to Tom.

(19)

743 Reserve Inn.—Tom finishes writing letter. He throws it on table. Garcia takes it & exists. Tom & Hernandez exit.

(20)

Hall of Villefort's Office.—Soldiers.—Garcia enters & is directed to door.

(21)

Office.—Watson at desk. Garcia enters, shows Watson letter, exits. Watson calls Magistrate, gives him instructions & he exits.

(22)

744 The Betrothal Feast.—Dantes protests when Morrel kisses Mercedes etc.

(23)

Betrothal Feast.

(25)

Office.—Watson at desk. Magistrate reports. Watson orders him to arrest Dantes.

(26)

Defendant's Exhibit 24

Stairway.—Soldiers going upstairs.

(27)

Bethrothal Feast.—Bos. is arrested & exits with soldiers.

(28)

Soldiers & Bos. coming downstirs.

(29)

Office.—Watson at desk. Bos. enters, gives letter to Watson. They go to fireplace & burn it.

(30)

Close-Up of burning letter.

(31)

Bos. exits.—Watson sends Magistrate after him.

(32)

Hall.—Bos. comes out, is arrested & exits with soldiers.

(33)

Betrothal Feast.—Anxious guests.

(34)

Dock.—Bos. gets into boat & rows out.

(35)

The Chateau d'If from the boat, rowing. wrong scene shows wireless

(36)

Parapet. Two Guards.

(37)

Gates of Chateau d'If.—Boat rows in. Gate opens. Bos. & Guards get out. Exit. Gates close.

(38)

Plan of Chateau.

Haidee
Pharoan
Fernando
Mispelled
in Monte Cristo

(Yellow Sheet)

Edmond Dantes and his betrothed, Mercedes.
972-2 06

M. Noirtier, of the Bonapartist Committee, entrusts Captain Leclere with a letter to the exile at Elba.

750 972-4 10

Fearing the near approach of death, Captain Leclere begs Dantes to deliver the letter to Napoleon.

972-7 11

Dantes assumes command of the Pharoah.
872-13 06

Dantes delivers the letter to Napoleon at Elba.
972-15 07

Napoleon entrusts Dantes with a reply to M. Noirtier.

972-17 07

Dantes returns home.

972-19 05

Dantes' father.

972-23 04

M. Morrel gives Dantes his Captain's papers as a wedding present.

972-27 08

Dantes incurs Fernand's hatred.

972-30 06

(Yellow Sheet)

Incensed by the news of Dantes' promotion, Danglars schemes his ruin.

972-33 09

The Betrothal Feast.

972-40 05

This one WITHOUT DIAMOND.

De Villefort, high in the favor of the King, fearing Dantes carries a message concerning Napoleon's return from exile (which would kill his own ambitions), determines to remove the young sailor from his path.

972-36 15

754

(yellow sheet)

To the dungeons of the Chateau d'If. 06
972-54

(yellow sheet)

SCRIPT TYPE

The Royal Prosecutor is informed that Edmond Dantes, mate of the Pharoah, now in port, was intrusted with a letter by the usurper for the Bonapartist Committee. Proof of his crime will be found upon arresting him, for, if the letter is not on his person, it will be in his cabin.

A friend to the Throne.

26 ft.
Repeats 03

(Yellow Sheet)

972-973-974—diamonds—repeated titles—numbers.

large type

756

The
Count of Monte Cristo.

medium type

(title)

Produced
by the
Selig Polyscope Co.

large type

972-1

Part I.

10

757

(a slide wanted similar to the above, for each reel)
973-1 and 974-1
Part 2 " Part 3

(yellow sheet)

972-973 with diamonds—repeated titles—numbers.

972-59 End of part one. 03

973-53 End of part two. 758

(yellow sheet)

SCRIPT TYPE

The Royal Prosecutor is informed that Edmond Dantes, mate of the Pharoan, now in port, was intrusted with a letter by the usurper for the Bonapartist Committee. Proof of his crime will be found upon arresting him, for, if the letter is not on his person, it will be in his cabin.

Regular Selig Announcement—REPEAT 759
TITLE same as on previous Announcements.

Dantes assumes command of the Pharoan.
972-13

Note—this announcement is replaced by new one. New length is 09 feet.

THE COUNT OF MONTE CRISTO

REEL 2.

Abbe's Cell.—Huntly at table. Guard is with him. Guard leaves. Huntly quickly moves stone from floor & crawls out.

761 Underground passage.—Huntly crawls thru towards Bosworth's cell.

Dantes' Cell. Bos. hears noise.

Underground.—Huntly reaches Bos.' cell.

Bos.' Cell.—Huntly is admitted very much exhausted. Bos. embraces him, puts him on bench & gives him water.

Corridor.—Guards. Villefort makes tour of inspection & talks close to Bos.' cell.

762 Dantes' Cell.—Huntly & Bos. talking. Bos. recognizes Watson's voice & Huntly tells him of his connection with his incarceration. In the course of the story Huntly falls asleep. Bos. in retrospective mood, sees the following dissolves.—

- 1.—Watson at a banquet table surrounded with wealth & luxury.
- 2.—Tom, the banker.
- 3.—Garcia, Besserer, & Rawlinson.
- 4.—Bos.' Father in poverty dying, and Morrel.

Corridors.—Guards going across with food for prisoners.

Dantes' Cell.—They hear the approach of the guards. Start to go back to other cell.

Underground.—Bos. drags Huntly thru towards his own cell.

Abbe's Cell.—They enter. Bos. places him on cot & revives him. He hears the guards & exits replacing the stone.

Underground.—Bos. listening at Huntly's cell. exit.

Corridor.—Guards with food.

Abbe's Cell.—Huntly on cot. Guards enter with food. Look at Huntly as they place it, commenting on the fact that he will soon kick in.

Bos. listening, exits.

Dantes' Cell.—Bos. enters, replaces stone as guard enters with food. They exit. Bos. starts back.

Abbe's Cell.—Bos. re-enters, gives him parchment & knife. Dies. (Cut-In Letter No. 1.)

Morning.—Abbe's Cell.—Guards enter & see that he is dead. One guard exits for sack.

Underground.—Bos. listening.

Defendant's Exhibit 24

Corridor.—Guards with sack & rope.

Abbe's Cell.—Guard brings in sack & prepares to put Huntly in sack.

Underground.—Bos. listening.

Parapet.—Guard pacing.

767 Abbe's Cell.—Huntly is in the sack. Guard exit leaving the door open. Goes to door as if to escape. Bos. enters, commenced to take Huntly from sack.

Parapet.—Guard pacing. Two guards enter, tell guard of death & pick out shots for weights.

Underground. Dante dragging Huntly's body, almost to his cell.

Bos.' Cell.—Bos. places Huntly's body on his cot, covers him & sadly takes leaves of him. Exits.

768 Corridor.—Guards laughing.

Abbe's Cell. Bos. gets into sack & lies on cot. Guards enter. Tie up sack & carry it out.

Corridor.—They carry it thru & exit.

Stairway up to parapet.—They carry it up.

Parapet.—They enter, tie shot to sack.—One, Two, Three, they throw it over.

Defendant's Exhibit 24

The Wall from the Sea.—The sack lands in the water.

The Open Sea.—Bos. arm appears thru the sack with knife. Dante dashed against rocks.

Rock.—The World is Mine.

(yellow sheet)
Title

10

The Abbe Faria.

770

In the dungeon of the Chateau d'If, after many years.
973-2

12

Dantes learns of De Villefort's connection with his long imprisonment and of his enemies' social advancement.

De Villefort—high in office,

Danglars—a wealthy banker,

Fernand—a general, and married to Mercedes, his betrothed, and of his father's death in poverty.
973-9

NO DIAMOND on this.

32

771

Dying, the Abbe bequeaths to Dantes the treasure hidden on the Isle of Monte Cristo and suggests a way of escape.
973-20

12

To the graveyard of the Chateau d'If.
973-36

07

"The World is Mine!"
973-43

06

Defendant's Exhibit 24

Dantes rescued by smugglers.	06
973-45	15
Map of treasure	100
	03
End of part 2	103

(yellow sheet)
 773 972-973—With diamonds and repeated titles and numbers.

REPEAT TITLE is

THE COUNT OF MONTE CRISTO.

for part 1

Dantes incurs the hatred of Danglers, the envious super-cargo, when he assumes command of the Pharoan.
 972-13 09 ft.

Part 2.

774 In the dungeons of the Chateau d'If, after many years.

For months the Abbe Faria has toiled, hoping to establish communication between his cell and that of some other unfortunate.
 973-2 18
 (no diamond)

De Villefort, the Royal Prosecutor, makes a tour of inspection.
 973-7½ 08

Defendant's Exhibit 24

Dante recognizes the voice of De Villefort in the corridor and learns from the Abbe Faria, who was imprisoned some years later than himself, that his sufferings have been due to the personal ambitions of the Royal Prosecutor, the spite of Danglers and the jealousy of Fernand.
 973-9 26
 (no diamond)

As the Abbe continues his tale, Dantes pictures Danglers as the wealthy banker.
 973-10 1/7 095

Mercedes and her husband, Fernand, now a general.
 973-10 3/7 07

And his father's death in poverty.
 973-10 5/7 06

Dying, the old man bequeaths the treasure hidden on the Isle of Monte Cristo to Dantes and suggests that he substitute himself for the Abbe in the burial sack, as the Chateau's dead are cast into the sea and there is a chance of thus escaping.
 973-20 22 777
 (no diamond)

974

THE COUNT OF MONTE CRISTO

REEL 3.

Deck of Smuggler's Schooner.—One calls Capt's attention to object in water. He uses telescope.

778

Thru Telescope.—Monte Cristo on the rock, waving.

B does not give telescope effect. Use last part from before wave.

Boat Rowing.—With smugglers.

Boat picks up Bos.

On Board Schooner.—Dantes comes on board.

779 Close-Up of Bos. coming over rail of ship. They take him off.

(3rd reel starts here)

The Isle of Monte Cristo. Boat approaching shore. 3 men & Bos. They put boat upon shore. Bos. lags behind & looks up his chart. Men go off in one direction. Bos. in the other.

Ext. Cave.—Bos. enters & goes into cave.

780 Inside Cave.—Bos. finds spot referred to in chart, tears away some loose stone & reveals old chest. Bring it out & opens it. It is packed with precious stones.

Int. Arabian Tent thru opening view of the Desert. Bos. surrounded by luxury.

Arabs & camels pass.

Int. Tent.—Preparation for departure. Bos. looks at priest's robe, suggesting his disguise. Dantes, having assumed the title of Monte

781

Cristo, with his adopted daughter, Haydee, etc., prepares for his mission of vengeance, etc.

Int. Caderous Tavern.—Hayward straitening up glasses.

Ext. Tavern.—Bos. in priest's robe, enters, looks thru window & knocks at door.

Int.—Knock. Fear. Hernandez opens door. Admits Bos.

Villefort's Office.—Clark is admitted, accuses Watson of treachery. Again inquires concerning young sailor. Leaves with warning. Watson terrified & conscience-stricken.

Tavern.—Hernandez & Hayward gloating over diamond.

Exterior.—Clark disguised as peddler. Knocks.

Interior of Tavern.—Clark is admitted. Asks for accommodation & is shown diamond. Buys it, showing wallet of bills.

Watson riding thru woods.

Interior.—Clark asks to be shown room. Hayward shows him upstairs.

Attic Room. He is shown in.

Tavern.—Hernandez alone. Watson enters, hand on Hernandez's mouth. Inquires about

782

783

Defendant's Exhibit 24

traveler, suggests murder. During conversation, Hayward comes down. Hernandez is silenced. Hayward takes axe & starts up.

Exterior.—Bos. at window.

Bedroom.—She enters, raises axe. Clark shoots. She staggers out. He jumps up.

Tavern.—She falls down. Watson starts up stairs. Meets Clark face to face. Starts for door, 785 meets Bos.

Reception Room.—The anticipation for the arrival of the Count of Monte Cristo.

Garcia, Tom, Besserer, Clark, Rawlinson.

Ext. Palace.—Arrival of Bos. & Eyton in carriage.

Same as 42.—Monte Cristo is announced. Albert meets him. Presents him to Mercedes. Recognition. Bos. & Besserer stroll off.

786 Conservatory.—Bos. & Besserer. He refuses fruit. Takes her back.

Reception Room.—He returns, ask Besserer to present him to her father. Tom. Presents Eyton. Insults Garcia. Rawly takes it up. Challenge.

Duelling Ground.—Bos. Rawly kneels.—Garcia exits.

Defendant's Exhibit 24

Garcia enters with gun.

They hear shot. Man exits.

Garcia dead.

Duelling ground.

(yellow sheet)

#974—With diamonds and repeated titles and numbers. Repeat Title is THE COUNT OF MONTE CRISTO.

788

Title 08

The Isle of Monte Cristo. 06
974-2

With the Abbe's legacy Dantes has purchased the island, assumed its title and is traveling in Africa with Haydee, his adopted daughter. 13
974-6

Dantes prepares to leave for Paris on his mission of vengeance, disguised as the Abbe Busoni. 789
974-8 10

The Inn of the Pont du Gard. 06
974-11

The reception to the Count of Monte Cristo. 06
974-32

"You will not fight him." 05
974-39

"Why not?" 03
974-41

"Because he is your son!" 05
974-43

(yellow sheet)
#974—with diamonds and repeated titles and numbers. Repeat title is THE COUNT OF MONTE CRISTO.

791 Noirtier's persistent inquiries concerning Edmond Dante cause DeVillefort to determine to put him out of the way. 11
974-15

Disguised as a jewelry peddler, Noirtier attempts to escape from the persecutions of De Villefort, whose fear and anger he has aroused by inquiries as to the fate of Edmond Dantes. 14
974-20.

792 To further his own ends De Villefort suggests robbery and murder. 09
974-27

Edmond Dantes, unrecognized by his enemies, confronts Fernand with Haydee, whose father Fernand treacherously killed. Mercedes' son, Albert, assumes the quarrel. 15
974-37

Having learned the truth from his mother, Albert apologizes. 08
974-45

(yellow sheet)
#974—With diamonds and repeated titles and numbers. Repeat title is The Count of Monte Cristo.

Noirtier, learning of De Villefort's determination, attempts to escape under the disguise of a jewelry peddler. 12
974-20

Noirtier is closely pursued by De Villefort. 794
974-23 06

Edmond Dantes reveals his identity to Mercedes. 06
974-35 1/2

Edmond Dantes, unrecognized by his enemies, confronts Fernand with Haydee, whose father Fernand treacherously killed. 13
974-37

Mercedes' son, Albert, assumes the quarrel. 795
974-38 7/8 06

"I am Edmond Dantes." 05
974-46 1/4

Dantes' challenges the treacherous Danglars. 06
974-50 1/4

Defendant's Exhibit 25

Description of Defendant's Pictures

MONTE CRISTO.

REEL ONE.

(1) Dantes and Mercedes on Rocks.

"Edmond Dantes and his betrothed Mercedes."

797 "M. Noirtier of the Bonapartist committee entrusts Captain Leclercq with a letter to the exile at Elba.

(2) Dock. Ship being loaded. Crowd of people. Noirtier gives letter to Captain Leclercq.

"Fearing the near approach of death, Captain Leclercq begs Dantes to deliver the letter to Napoleon."

(3) Captain's cabin. Captain Leclercq in berth. Dantes gives him medicine. Captain gives a letter and ring to Dantes. Captain dies. Dantes exits.

798 "Dantes incurs the hatred of Danglars the envious super-cargo, when he assumes command of the "Pharoah."

(4) Danglars looking through cabin window as Captain gives letter to Dantes. Companionway of ship, several sailors and Danglars waiting. Dantes comes from cabin, announces death of Captain Leclercq and assumes command of the ship and arouses the hatred of Danglars.

"Dantes delivers the letter to Napoleon at Elba."

(5) Room with three men in uniform. Table in the centre of the room. Towards the back of the room there is a high back chair in which is seated Napoleon. The back of the chair is towards the audience. Dantes enters, speaks to Napoleon's chamberlain. Napoleon takes seat at a table, speaks to Dantes. Dantes shows Napoleon the ring. Dantes delivers the letter he received from Captain Leclercq to Napoleon.

"Napoleon entrusts Dantes with a reply to M. Noirtier."

800

(6) Dantes receives a letter from Napoleon. Dantes kisses Napoleon's hand and exits.

"Dantes return home."

(7) Landing place. Crowds of people waiting for the return of The Pharoah. Sailors landing from the ship. Dantes leaves ship, meets Morrell, and Noirtier speaks to Dantes. Dantes shows him the ring. Danglars standing back.

(8) Street scene showing Morrell's office. Morrell and Dantes go into office.

801

(9) Interior of Morrell's office. Morrell and Dantes enter, go to desk. Dantes gives Morrell some papers. Danglars enters and makes charges against Dantes. Morrell turns to Dantes and speaks to him.

"Dantes' Father."

(10) Dantes' father's attic. Dantes' father alone and expectant. Dantes enters; embraces father.

802

(11) Street scene showing exterior of Morrell's office. Danglars leaving office meets Caderousse. Both leave.

(12) Interior of the Reserve Inn. Danglars and Caderousse enter. Character playing part of La Caronte serves drinks, and places same on the table. Danglars and Caderousse drink. Caderousse staggers out.

"M. Morrell gives Dantes his Captain's papers as a wedding present."

803

(13) Attic of Dantes' father. Dantes and his father in the room. Caderousse enters and greets Dantes. Morrell enters, and hands papers to Dantes. Caderousse leaves then. Dantes leaves.

(14) Interior of Reserve Inn. Danglars seated at the table. Caderousse enters. Tells of Dantes' promotion.

"Dantes incurs Fernand's hatred."

804 (15) Exterior of Mercedes' home. Fernand and Mercedes talking. Dantes enters, embraces Mercedes and offers his hand to Fernand. Fernand draws a knife and leaves in jealous rage.

"Incensed by the news of Dantes' promotion, Danglars schemes his ruin."

(16) Reserve Inn. Danglars and Caderousse seated at the table. Danglars writing letter. Fernand enters. Caderousse calls him. He takes a seat and talks to Danglars. Noirtier enters.

805

"The Royal Prosecutor is informed that Edmond Dantes, mate of the 'Pharoah,' now in port, was intrusted with a letter by the usurper for the Bonapartist Committee. Proof of his crime will be found upon arresting him, for, if the letter is not on his person, it will be in his cabin. A friend of the Throne."

(17) Reserve Inn. Danglars finishes writing the letter. He throws it on the table. Fernand grabs it and exits. Caderousse staggering after Fernand tried to get letter. Danglars holds Caderousse back and gives him a glass of wine. Noirtier advances several paces from rear at gate.

806

"DeVillefort high in the favor of the King favoring Dantes, carries a message concerning Napoleon's return from exile which would kill his own ambitions, determines to remove the young sailor from his path."

(18) Ante-room to Villefort's office. Soldiers guarding the ante-room. Fernand enters and is directed to a door leading to Villefort's office.

(19) Villefort's office. Villefort is at the desk. Fernand enters and hands the letter of denunciation to Villefort. Villefort calls police agent and gives him instructions to arrest Dantes and he exits.

807

(20) The betrothal feast. Room with long table at which are seated guests and various persons walking about in hall.

Defendant's Exhibit 25

808

(21) Villefort's office. Villefort at the desk. Police Inspector reports. Villefort orders him to arrest Dantes.

(22) Stairway. Soldiers going upstairs, led by Police Agent.

(23) The betrothal feast. Same room. Dantes arrested and exits with soldiers.

809 (24) Soldiers and Dantes marching down the same stairs with Dantes under arrest.

(25) DeVillefort shows Dantes accusation.

(26) Villefort's office. Villefort at desk. Dantes enters. Gives letter to Villefort who reads same. They go to fireplace and Villefort throws the letter into the fireplace and carries on friendly talk with Dantes.

Same scene, letter burning.

810 (27) Same scene. Dantes exits. Police Inspector enters. Villefort talks to inspector who follows Dantes.

(28) Ante-room to Villefort's office. Dantes comes out of Villefort's office. Steps into ante-room, is arrested and exits with soldiers.

(29) Dock. Dantes gets into a boat and is rowed out into the open sea.

"To the dungeons of the Chateau d'If".
Parapet of Chateau d'If. Two guards.

Defendant's Exhibit 25

811

(30) Gates of Chateau d'If. Gates of the prison are opened. The boat rows in. Dantes and the guards get out. Gates closed.

REEL TWO

"For months the Abbe Faria has toiled, hoping to establish communication between his cell and that of some other unfortunate."

(31) The cell of Abbe Faria. Faria sitting at a table. Guard leaves. Faria removes a stone from floor and crawls into underground passage. 812

(32) Underground passage. Faria crawling through underground passage towards Dantes' cell.

(33) Dantes' cell.

(34) Underground passage. Faria reaches Dantes' cell.

(35) Dantes' cell. Faria is admitted very much exhausted. Dantes raises him and places him on his cot, and gives him water. 813

"DeVillfort the Royal Prosecutor makes a tour of inspection."

(36) Corridor of prison. Guards accompanying Villefort on a tour of inspection through the prison.

"Dantes recognizes the voice of DeVillefort in the corridor and learns from the Abbe Faria, who was imprisoned some years later than himself that his sufferings have been due to the per-

Defendant's Exhibit 25

sonal ambitions of the Royal Prosecutor, the spite of Danglars and the Jealousy of Fernand."

(37) Dantes' cell. Faria and Dantes talking. Dantes recognizes Villefort's voice and Faria tells him of his incarceration. In the course of the narrative Dantes sees the following dissolves:

(38) 1. Villefort at a banquet table surrounded with wealth and luxury.

815 2. Danglars, the broker.

3. Fernand and Mercedes.

4. Dantes' father in poverty dying, and Morrell.

As the Abbe continued his tale, Dantes pictures Danglars as a wealthy banker.

Mercedes and her husband, Fernand, now a general.

"And his father's death in poverty."

(39) Corridor of prison and guards going across with loaves of bread and iron pitchers of water for prisoners.

(40) Dantes' cell. Dantes and Faria hear the approach of the guards. They start to go back to Faria's cell. Underground passage. Dantes drags Faria back to his (Faria's) cell.

(41) Abbe Faria's cell. They enter. Dantes places him on the cot and revives him. Dantes hears the guards and exits, replacing the stone.

(42) Underground passage. Dantes listening at Faria's cell.

Defendant's Exhibit 25

(43) Corridor. Guards with food.

(44) Faria's cell. Faria on his cot. Guards enter with food for Faria; look at Faria as they place the food, commenting on the fact that he will die soon.

(45) Dantes listening. Exits.

(46) Dantes' cell. Dantes enters replacing stone as guards enter with food. They exit. Dantes starts back. 818

"Dying, the old man bequeaths the treasure hidden on the Isle of Monte Cristo to Dantes and suggests that he substitute himself for the Abbe in the burial sack, as the Chateau's dead are cast into the sea, and there is a chance of thus escaping."

(47) Abbe's cell. Dantes re-enters. Faria gives a partly torn parchment to Dantes and shows him a knife and Faria then dies.

(48) Morning. Abbe's cell. Guards enter and see that the Abbe is dead. Two guards exit for sack. 819

(49) Underground. Dantes listening.

(50) Corridor. Guards with sack and rope.

(51) Abbe's cell. Guards bring in sack and prepare to put Abbe into sack.

820

(52) Underground. Dantes listening.

(53) Parapet. Guards laughing and pacing on parapet.

(54) Abbe's cell. Abbe is in the sack. Guards exit leaving the door open. Dantes enters; comes to take Abbe from the sack.

821 (55) Parapet. Two guards enter. Tell guard of death to pick out shots for weight.

(56) Underground. Dantes dragging Faria's body through underground passage almost to his cell.

(57) Dantes' cell. Dantes places Faria on his cot, covers him and sadly takes leave of him. Exit.

(58) Corridor. Guards laughing.

822 (59) Abbe's cell. Dantes gets into burial sack and lies on cot. Guards enter. Tie up sack and carry it out.

(60) Corridor. Guards carry burial sack through corridor.

"To the Graveyard of the Chateau d'If."

(61) Stairway up to parapet. Guards carry burial sack up.

823

(62) Parapet. Guards enter tie shot to sack. Guards swing sack, one, two, three; they throw it over the parapet into the sea.

(63) The rocks and the sea. The sack lands in the water.

(64) The open sea. Dantes' arm appearing through sack with knife. Dantes dashed against the rock.

"The World is Mine."

824

(65) Rock. Dantes freeing himself from the sea, emerging from the water and appearing on the rock with outstretched arms.

"Dantes rescued by smugglers."

(66) Deck of smuggler's schooner. Sailor calls Captain's attention to object in water. Captain looking through a telescope. Dantes on a rock waiving.

(67) Ship with the sailors getting into a row boat and rowing off with smugglers.

825

(68) The sea. Dantes swimming and the sailors picking up Dantes.

(69) On board schooner. Dantes coming over the rail of ship and being taken on board.

REEL THREE

"The Isle of Monte Cristo."

(70) Row boat holding three men and Dantes approaching shore. They put boat upon shore, Dantes hanging behind and looks up his chart. Men go off in one direction, Dantes in the other.

(71) Exterior of cave. Dantes enters and goes into inside of cave. Dantes finds spot referred to in chart, tears away some loose stones, takes knife and works at rock until he loosens it, rolls it away and finds old chest, opens it and finds precious stones.

827 "With the Abbe's legacy he has purchased the Island, assumed its title and is travelling in Africa with Haydee, his adopted daughter."

"Dantes prepares to leave for Paris on his mission of vengeance, disguised as the Abbe Busoni."

(72) Interior Arabian tent through opening view of the desert. Dantes surrounded by luxury.

(73) Procession of camels and Arabs crossing the desert.

828 (74) Interior of tent. Preparation for departure. Dantes is shown in the tent with Haydee. Ali enters and gives him a priest's robe. Dantes examines the robe.

(75) "Interior of the Inn of Pont du Gard."
La Carconte straightening up glasses and Caderousse walking around.

(76) Exterior of the Inn. Dantes in priest's robe, looks through window at the Inn and knocks at the door.

"Noirtier's persistent inquiries concerning Edmond Dantes causes Villefort to determine to get him out of his way."

(77) Interior. La Carconte and Caderousse. Dantes gives a diamond to Caderousse. Caderousse opens the door and admits Dantes.

(78) Villefort's office. Noirtier is admitted. Accuses Villefort of treachery; inquiries concerning Dantes. Leaves with warning.

"To reward the good and punish the guilty." 830

(79) Interior. Inn Pont du Gard. Caderousse and La Carconte are gloating over the Abbe's diamond.

"Noirtier learning of Villefort's determination attempts to escape under the disguise of a Jewish peddler."

(80) Exterior. Noirtier disguised as a peddler. knocks.

(81) Interior. Noirtier is admitted, asks for accommodation and is shown diamond, buys it, showing a wallet of bills.

"To further his own ends DeVillefort suggests robbery and murder."

(82) Villefort riding through woods.

(83) Interior of Inn. Noirtier asks to be shown room. La Carconte shows him upstairs.

(84) Attic room.

(85) Noirtier shown in.

"Noirtier is closely pursued by Danglars."

(86) Inn. Caderousse alone. Villefort enters, puts his hand over Caderousse's mouth. Conversation ensues. During conversation LaCarconte comes downstairs. Villefort picks bottle from the table and hits Caderousse over the head with the same.

833 (87) LaCarconte takes axe from mantlepiece and goes upstairs.

(88) Bedroom. Noirtier is in bed. LaCarconte enters and raises clever. She goes over to the bed and just as she is about to strike, Noirtier shoots her. She staggers out. He jumps up.

(89) Exterior. Dantes at the window, peering into the Inn.

834 (90) Inn. LaCarconte rolls half way down the stairs. Villefort starts upstairs. Noirtier comes downstairs, and meets Villefort face to face. He starts for the door and meets Dantes. Villefort then kills himself with a sword.

"Reception of the Count of Monte Cristo."

(91) Reception room. Anticipation of the arrival of Monte Cristo. Guests. Exterior of the Palace. Arrival of Dantes and Haydee.

(92) Monte Cristo is announced. Albert meets him and presents him to Mercedes. She recognizes him. Dantes and Mercedes stroll off.

"Edmond Dantes reveals his identity to Mercedes."

(93) Conservatory. Dantes and Mercedes. Dantes refuses grapes. Takes her back to reception room. Reception room.

"Edmond Dantes unrecognized by his enemies confronts Fernand with Haydee whose father Fernand directed killed."

(94) Dantes confronts Fernand with Haydee and charges Fernand as the betrayer of Haydee's father. 836

"Mercedes' son, Albert, resumes quarrel."

(95) Albert takes up quarrel. Removes glove to slap Dantes. The latter seizes his hand and pushes him down.

"You will not fight him."

"Why not?"

"Because he is your son."

"Learning the truth from his mother, Albert apologizes."

(96) Duelling ground. Albert apologizes to Dantes. Fernand enters with gun to fight Dantes. 837

"I am Edmond Dantes."

"Dantes challenges the treacherous Danglars."

Scene shows Dantes challenging Danglars and getting ready for the duel. Dantes with his back to Danglars putting his coat on the ground, Danglars rushes and tries to stab him in the back, but is prevented by Noirtier. Mercedes comes on during the fight and is held back by Albert.

"Dantes kills Danglars in a duel."

Defendant's Exhibit 26

MONTE CRISTO

Sources of Defendant's Pictures

Reel One.

PICTURES:

SOURCES

1. Dantes and Mercedes on Rocks.
- 839 2: The Dock.
- 3: Captain's cabin. Death of Captain Leclercq.
- 4: Danglars looking through cabin window.
- 5: Napoleon's room.
- 840 6: Dantes receives a letter from Napoleon.
7. Return of "The Pharoah."

Similar scenes as those depicted in pictures indicated in Novel—French-Lacy version and Dumas, dramatization and London Daily Telegraph (Version).

Novel, pages 53-54.
Act II, Part I, 33, Dumas' dramatization. —Act I, Part I, p. 5.
French-Lacy, Act I, p. 10.
" " " 19.

Dumas' dramatization, Part I, Act I, page 8.

Novel, page 119.
French-Lacy, p. 25.

Dumas' dramatization, Act. I, Part I, page 6-7.

French-Lacy, p. 10.
Novel, page 54.

Novel, page 54.
Dumas' dramatization, Act II, Part I, page 34.
French-Lacy, p. 27.

Novel, page 1.
Dumas' dramatization, Part I, Act II, pages 17, 18, 19, 20.

In this scene Noirtier tells Edmond that he has learned of the death of Captain Leclercq, and inquires whether he has not in his possession a letter intended for him, addressed to Mr. Noirtier, No.

Defendant's Exhibit 26

5 Coq-Heron Street, Paris. Edmond replies that he may have the letter, that the letter is on board the "Pharoah."

Noirtier engages a room in the Reserve Inn. The description of Noirtier's as follows:

"And he is the man whose description I have given you, forty or forty-five years of age, black hair, black clothes, overcoat buttoned up, rosette of an officer of the Legion of Honor."

Dumas dramatization, Act II, Part I, page 26. Villefort is described in the novel as being of the age of 27 years.

Novel page 49.

French-Lacy p. 20.

Part I, Act II, scene 3, pages 5-6 Dumas' dramatization.

Part I, Act I, pages 4, 7-8, Dumas' dramatization.

Act I, part I, Tableau 2, page 12-14, Dumas' dramatization.

"At the house of Edmond's father. A little room with a mansard roof, window filled with climbing plants." Scene 3, page 14.

French-Lacy, Act I, p. 6-7.

Act I, Part I, scene 6, p. 20, 21, Dumas' dramatization.

"Danglars: If we were to go down that way too. . . . We could stop at the Reserve and, while drinking a glass of wine we would hear the news?"

Caderousse: Who will give us any?" Scene between Noirtier and Danglars,

page 22.

Dumas' dramatization, part I, page 21.
French-Lacy, Act I, p. 9.

8: Street scene.

9: Interior of Morrell's office.

10: Dantes' father's attic.

11: Exterior of Morrell's office.

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12: Interior of Reserve Inn.

Act 2, Part I, 4th tableau.
"A tunnel in the hall of a cabaret at
The Reserve." Scene I, Caderousse and
Danglars.

13: Attic of Dantes' father:

Dumas' dramatization, p. 1.
Part I, Act 2, p. 20.

Part I, Act II, page 16.
"Edmond: Let us be seated. (They
sit) what's that.

Morrel: Read it, Edmond.

Edmond: My commission as captain
signed by you and your partner. Oh,
Mr. Morrel! Oh, father!

Morrel: It is my wedding present."
Dumas' dramatization, pages 16-17.
French-Lacy, p. 17.

14: Interior of Reserve Inn.

Same as picture 12.

15: Dantes incurs Fernand's
hatred.

Exterior of Mercedes' home.
Novel, page 23.
"Edmond and Mercedes remain folded
in each others arms. *** Suddenly Ed-
mond perceived the dark visage of Fer-
nando, as, with a sudden movement of
which he was hardly conscious, the young
Catalan placed his hand on the knife in
his belt."

Act I, part I, 3rd Tableau, Scene I,
pages 24, 25, 26, 27 Dumas' dramatiza-
tion.

French-Lacy, p. 11-12.

Dumas' dramatization, Act II, part I,
pages I to II.

Novel pages 28, 33, chapter 4.
The Plot. In this scene Noirtier,
known as the unknown, enters and holds
conversation with Caderousse and Dang-
lars and makes inquiry of Danglars re-
garding Edmond. Noirtier appears in
the Inn, Act II, Part I, scene 7, pages
17 to 20, inclusive. This scene is laid

16: Danglars schemes Dantes
ruin:
Reserve Inn.

Defendant's Exhibit 26

(See Dumas' ver-
sion p. 19.)

in the Inn. Noirtier makes inquiries re-
garding the letter which Napoleon de-
livered to him for Noirtier. Edmond in
this scene invited Noirtier to be present
at the betrothal festival, and at page 20,
Edmond says to Noirtier:

"In the meantime, sir, we are having
a feast, and if you will be one of us."
The business of Fernand grabbing the
letter and running off with it, and
Caderousse attempting to get it is de-
scribed on page 11, Act 2, part I, Dumas'
dramatization.

Caderousse is not represented in the 848
pictures as an inn keeper or a tailor, nor
is he represented as an inn keeper in
plaintiff's version.

Plaintiff's version, p. 2. LaCarconte
says:

"The drunken sot! He is swilling in
some low wine shop. He will surely
drink up the little money we have," etc.

On page 6 Caderousse says: "Wife
gone, then I may show myself."

Description of Caderousse, page 17,
novel, as a dark bearded faced man,
costume. French's version, page 78.

French-Lacy p. 13, 17.

17. Same as 16:

18: Ante-room to Villefort's
office.

19: Same as 18:

20: Betrothal feast.

Part I, Act II, scene 1. 5th Tableau.
Office of Mr. De Villefort. p. 25, Dumas'
version.

Novel, chapter 5, page 33. Part I,
Act 2, page 14. Dumas' dramatization.
In this scene the inn keeper says: "To
the table gentlemen, to the table." (page
16) In this scene are gathered sailors,
Edmond, Mercedes, Dantes (father),
Morrell, Danglars, Fernand and Cad-
erousse (page 17). In this scene at
the Inn, Noirtier comes in and has a
conversation with Edmond.

21: Villefort's office.

Act II, Part I, page 25. Dumas' dramatization.
French-Lacy, P. 18.

22: Stairway.

Novel, page 37: "Immediately a rumbling noise was heard, and the sound of heavy footsteps on the staircase and a confused sound of voices mingled with the clanking of bayonets, drowned the eager exclamations of the guests, who subsided into anxious silence as the commotion increased, and three loud knocks resounded at the door."

851 23: Bethrothal feast.

Page 37 novel.
French-Lacy, pp. 17-18.
London Daily Telegraph, Oct. 19, 1868.

24: Soldiers and Dantes marching down stairs.

Novel, page 37-38.
Dumas' dramatization Act 2, Part I, page 22-23.

25: } DeVillefort shows Dantes
26: } accusation.
27: }
28: }

Novel page 53, de Villefort says:
"I am going to depart from the ordinary regulations of the law, and aid you in throwing some light on the matter, by showing you the communication which caused you to be brought before me. This is the indictment; do you recognize the writing?"

"Villefort drew the letter from his pocket and handed it to Dantes."

Dumas's dramatization, Act 2, part I, pages 31, 32, 33, 34, 37, 38, 39, 40.
French-Lacy p. 21.

In scene 6, page 35, Noirtier appears and has a conversation with Villefort.

Noirtier, brother of Villefort, London Daily Telegraph Oct. 19, 1868.

In scene 8, page 41, Noirtier appears, has changed his clothes and shaved off his whiskers.

Noirtier changes costume and disguise. London Daily Telegraph.

On page 42 Noirtier gives a description of himself.

26: Villefort's office.
Villefort at desk and Dantes enters.

Dumas' dramatization, Part I, Act 2, pages 31 to 35.

Edmond tells Villefort the circumstances of the trip to Elba, the death of the captain, the receipt of the ring and letter from Napoleon.

On pages 37-38 Edmond tells Villefort to whom letter was addressed.

Franch-Lacy p. 21.

Novel, page 55, Villefort says:

"I shall have to detain you as a prisoner for some time, as short a time as I am able. The principal charge against you is this letter, and you see this?—and Villefort approached the fireplace, tossed the paper into the fire, and waited until it was reduced to ashes. 'There, you see, I have destroyed it. Now, after such an act, you feel, do you not, that you can have confidence in me?'"

Dramatic version of situation, Dumas' dramatization, page 4.

27: Same scene.

Part I, Act 2, page 40. Dumas' dramatization.

Villefort rings, the inspector enters. The inspector and Edmond leave.

Novel page 56.

Dumas' dramatization page 42 Villefort says to the police agent:

"The one arrested at the Reserve. Have him taken immediately to the castle d'If, jailed, put into the most secret cell. Here is the order for the governor. Go."

(The agent goes out.)

Ante-room described in novel at page 51 as follows:

"The antechamber was full of officers and police agents, and in the midst of them, closely guarded, and gazed at by those around him with fierce and searching glances, stood the prisoner, calm and motionless. Villefort crossed the hall, casting a side-long look on Dantes, and

Defendant's Exhibit 26

having received a bundle of papers delivered to him by a police agent, disappeared into an adjoining room, saying, "Let the prisoner be brought in." * * * "Villefort with a grave and forbidding aspect, seated himself at his desk. An instant later Dantes entered."

28: Ante-room to Villefort's office.

857 29: Dock. Dantes gets into boat.

Novel page 56. On reaching ante-chamber, the commissioner of police arrests Dantes.

French-Lacy, p. 22.

The Chateau d'If. Novel page 56 to 64.

Novel p. 58, Dantes put into boat and rowed off to Chateau d'If.

Novel, p. 59: "He saw, rising before him, the black and frowning rock, on which, like an excrescence of flint, stands the gloomy Chateau d'If."

30: Gates of Chateau d'If

Described on page 60 of Novel! Page 61 of Novel shows Dantes put into the cell.

REEL TWO

858 "The two dungeons in the Chateau d'If, separated by a thick wall which the prisoners have cut through. At rise of curtain they are both seen in the practical excavation of this wall. Above is a balcony on which the sentinel walks back and forth." Act V, Part I, page 1. Dumas' dramatization. Act II, French-Lacy version, p. 22-31.

31: Cell of Abbe Faria.

Novel page 94. Abbe Faria, No. 27, a man in ragged and tattered garments. "Suddenly, towards nine o'clock in the evening he heard a muffled sound on the other side of the wall against which his bed was placed. * * * It was the scratching sound, either of a powerful claw, or strong teeth, or the rubbing

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of some kind of instrument on the stones." Novel p. 101.

"Ah," said Dantes, "I hear a human voice." Novel page 106.

"The cell was laid with flags, and it was removing one of these flags in the darkest corner that he had begun the laborious operation of which Dantes had seen the conclusion."

Novel page 115.

French-Lacy, P. 24.

32: Underground passage.

Novel p. 109.

"... then through the dark aperture he saw first a head, then the shoulders, and finally the whole form of a man emerging with considerable dexterity through the fallen rubbish." 860

Description of Abbe, Novel p. 109.

After creeping along the subterranean passage, Dantes at last reached the other extremity, which opened into the abbe's room."

French-Lacy, p. 24.

33: Dantes' cell.

Part I, Act III, page 8 Dumas' dramatization. Dantes hears sounds made by Faria.

Hears a voice. page 9, 19.

"The Voice: I know you. This stone that I am now penetrating leads then into your dungeon." 861

Edmond: Yes:

The Voice: About what part of your dungeon?

Edmond: Behind my bed."

(page 10.)

French-Lacy, p. 24.

34: Same as 33.

35: Dantes' cell.

Novel, pages 109-115.

"Dantes took in his arms this new friend." (p. 109.)

Part I, Act III, p. 10, Dumas' dram. French-Lacy version p. 24.

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36: Tour of inspection.

Act III, Part I, page 2, De Baille
makes tour of inspection.
French-Lacy version pp. 22, 23.
Part II, Scene X, Act III, p. 19,
Dumas' dramatization.
Villefort makes tour of inspection.
London Daily Telegraph, 1868.

37: Dantes' cell.

Act III, part I, page 16.
Dantes tells Faria of the cause of his
incarceration. Mentions the names of
Danglars, Fernand and Caderousse. (see
pages 16, 17, 18, 19)
Mentions that Villefort burned the de-
nunciatory letter. (page 20, Act III,
part I, Dumas' dramatization.)
French-Lacy, p. 25, 26, 27.

38:

Act IV, Part I, page 3.
Fernand has become the Count de Mor-
cerf and a General in the French Army,
Mercedes, his wife, and Danlars a mil-
lionaire.

(Dumas' dramatization.)
Act IV, Part I, p. 3 Dumas' dram.

Part I. Act 3, pp 5 and 6. Dumas'
dramatization.

French-Lacy, p. 31.

Act 5, Part I, page 12 Dumas dram-
atization.

Act V, Part I, pages 5, 8. Dumas'
dramatization.

39: Corridor and prison.

40:

864 41: Dantes revives Faria.

42: Underground passage.

43: Corridor.
Guards with food.

44: Faria's cell.

45: Dantes' listening.

46: Dantes' cell.

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"Faria: Edmond, look!

Edmond: What is this?

Faria: Look well.

Edmond: I am looking with all my
eyes and see nothing but a paper half
burned on which are traced some Gothic
characters in a strange ink.

Faria: This paper, my friend . . .
and now I can acknowledge all to you
since I have proved you . . . this
paper is my treasure which, from today
is yours." (p. 5.)

Faria dies. p. 8.

London Daily Telegraph, Oct. 19,
1868. 866

French-Lacy, p. 31-34.

47: Abbe's cell.

The Abbe's cell. Chap. 17, pages 115-
116. (Novel.)

"Faria drew forth three or four rolls
of linen, folded one over another, like
sheets of papyrus, about four inches
wide and eighteen in length. The strips
were all numbered, and covered with
writing in the Abbe's mother tongue,
which Dantes, being a Provencal, under-
stood perfectly." (p. 116)

"Ah! the penknife did that!" said
Faria; "it is my chef-d'oeuvre. I made
it, as well as this knife, from an old iron
candlestick." (p. 116.) 867

In Plaintiff's version:

"Faria: There in the foot of the bed,
which I have hollowed, you will find a
knife, take it." (p. 55.)

Scene 2, Act V.

Part I, Page 8, Dumas' dramatization.

"Jailor: The old man is dead."

French-Lacy p. 34.

48: Abbe's cell.

49: Underground.

Part I, Act V, page 12 Dumas, dram-
atization.

"Edmond: If they should open my
cell in passing . . . (He returns pre-
cipitately to his cell.)"

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50: Corridor.

51: Abbe's cell.

869 52: Underground.

53: Parapet:

54: Abbe's cell.

870 55: Parapet.

56: Underground and
& Dantes'
57: cell.

Novel page 143.
"He shall be decently deposited in the newest sack that we possess; you may be easy on that score."

Novel page 143.
"Meanwhile the operation of enshrouding the corpse was proceeded with."

French-Lacy, p. 34.
Dumas' dram. Act V, Part I, p. 13.
"1st Jailor: (in Faria's cell) He ties the sack."

French-Lacy, p. 34.

Act III, Part I, page 12 Dumas' dramatization.

"It looks on the gallery where the sentinals walk."

French-Lacy, p. 35.

Novel, page 144.
"He (Dantes) cautiously raised the flagstone and peered inquiringly into the cell. It was empty; slowly emerging from the passage, he entered."
Dumas' dramatization, Act V. Part I, p. 12. Edmond returns to Faria's cell and looks at the dead man.

French-Lacy, p. 35.

French-Novel, p. 35. Bearing the body he disappears.

Novel page 145.
"Dantes slowly drew out the corpse of his dead friend carried it to his own cell, and laid it on the bed."
Dumas' dramatization, Act V, Part I, page 12 and 13:
"Let me take the place of the dead."
* * * * This knife, good. * * * * If they try to stop me, I have the knife

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* * * * (He goes to put Faria on his own bed.) If they come in here they will think I am asleep."

French-Lacy, p. 35.

"This knife (taking one from the bed) Good! I will return and place myself within that sack."

Novel page 145.

"Dantes gets into the open sack, stretches himself out and closes up the opening from within." (French-Lacy, p. 35.)

Act V, Part I, p. 13. Dumas' dram. 872
Edmond has shut himself up in the sack.

Part I, Act V, page 14, Dumas' dramatization.

They pick up the sack.

French-Lacy, p. 35.
Novel, page 146.

French-Lacy, p. 35.

Novel, page 147.

One! Two! Three!

Part I, Act V, Eleventh Tableau, page 14, Dumas' dramatization.

"The platform of the Chateau d'If, all around can be seen rocks and the sea." 873
They tie a 36 calibre bullet to the sack. (P. 14-15.)

"One! Two! Three." They throw the body which disappears. Edmond appearing on the rocks: "Saved! My God! Saved!" (p. 15.)

French-Lacy, p. 36.

"The world is mine!" Act I, Part II, p. 11. (Dumas' dram.)

Novel, page 147.

Dantes has been thrown into the sea.

58: Corridor.

59: Abbe's cell.

60: Corridor.

61. Stairway up to parapet.

62: Parapet.

63: The rocks and the sea.

874

64: Open sea.

65: Open sea.

875 66: Deck of smuggler's schooner.

67: Ship with sailors.

68: Open sea.

69: On board schooner.

876

Novel, pages 147-148.
 " * * * and with his right hand, in which he held the open knife ready for any emergency, he cut open the sack, and extricated his head and arm."

Novel, page 149.
 "Dantes lifted his head, advanced a few steps, and throwing himself on the rough granite rocks, which appeared to him softer than a couch of down, he thanked God for his deliverance."
 French-Lacy, p. 36.

Novel, page 151. * * *
 "He saw * * * a small barque."
 "They are probably smugglers."

Novel, page 151.
 "The tartan instantly steered towards him, and at the same moment he saw that they were launching a boat."

Novel, page 151.
 "Then Dantes loosed his hold of the plank, and swam vigorously to meet them."
 "He felt himself seized by the hair."

Novel, page 152-155.
 "On opening his eyes, Dantes found himself on the deck of the tartan; his first glance was to see what direction she was following."
 Description of Dantes. Beard and hair about a foot long. Novel pp. 152-155.

877

THIRD REEL

THE ISLE OF MONTE CRISTO.

70: Row boat and Dantes approaching shore.

Novel, chapter 23, pp 158-163.
 Part II, Act I, First Tableau Dumas' dramatization, page 1, "The Island of Monte Cristo. In front of stage at right the sandy beach; the sea and the oriental shores of Corsica; at left the island rising in mountains."

Dumas' dramatization, Act II, Part I, pages 7 and 8. (Scene III.)

878

71: Exterior of Cave.

Novel, page 165:
 "A circular opening was now disclosed, and in the center a square stone with an iron ring attached to it. (165.)
 "It is a wooden chest set in iron."
 (p. 168 novel.)

Dumas' dramatization, Act II, Part I, pages 7 and 8.

"With the help of an iron ring fastened in the stone, he raises it." (p. 11.)
 The opening of the cave is lighted and Dantes appears, the torch in his hand, his face aglow. (p. 11)

879

72: Interior of Arabian tent.

73: Arabs crossing desert.

Novel page 306.
 On page 306 there is a description of an Arabian attack on the travelers.

Description of Dumas' costume, Novel, pages 221-222.

French-Lacy, p. 36.

74: Interior of tent.

75: Inn of the Pont Du Gard.

LaCarconte straightening up glasses.

Novel, chapters 26 and 27. pages, 174 to 192.
 Also pages 343 to 352 of Novel.
 Description of Caderousse in novel

76: Exterior of the Inn.

77: Interior of Inn.

page 174.
Description of LaCarconte in novel.
page 175.
Description of Busoni in novel, page 175.
The Inn of the Pont Du Gard, Act 2, Second Tableau, Part 2, page 1.
London Daily Telegraph.

Act two, part 2, scene II, page 4
Dumas' dramatization. (Busoni with a cloak over his riding habit.
"Busoni: (Outside) Yes, my friend.
Caderousse: Then you have found it.
. . . . This is it.
Busoni: Good. (He gets off the horse."

French-Lacy, p. 37.

French-Lacy, Act III, p. 36.
Act II, Part 2, Scene II, pages 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, (Dumas' dramatization.)

Caderousse tells Busoni that Mercedes married Fernand 18 months after the disappearance of Edmond. (p. 16.)
French-Lacy version Act 3, page 37:
"Enter Edmond Dantes, C. D., as the Abbe Busoni.—clerical hat, cloak, coat with large flaps, riding gaiters and whip, black wig."

Act II, Part 2, pages 17-18:
"Busoni: Take this diamond, it is yours.

Caderousse: Oh, sir, you are not making fun of me?" (p. 17.)

Busoni: Here is the diamond.

Caderousse: Oh, you are surely a fine man."

Scene III, LaCarconte and Caderousse gloating over the diamond. (pages 18-19 Dumas' dramatization.)

On page 6 of Act II, part II of Dumas' dramatization, Busoni says:

"I am convinced the honest man is rewarded and the wicked man punished."

78: Villefort's office.

79: Interior of Pont Du Gard.
Caderousse and La Carconte gloating over diamond.

80: Noirtier disguised as a peddler.

81: Interior of Inn.

82: Villefort riding through woods.

83: Interior of Inn.

French-Lacy version, Act III, page 41,
Scene 1: Edmond draws ring from his pocket gives Caderousse the ring and says:

"This diamond is yours."

See Novel pages 190-191.

Morrel makes inquiries of Villefort regarding Edmond.

Part I, Act IV, p. 5. Dumas' dramatization.

Noirtier makes Villefort promise that Dantes shall be produced at Inn Pont du Gard at the end of the month and he Noirtier will be present. London Daily Telegraph. 884

French-Lacy version Act 3, Scene 1, page 42:

"Cade. (turning to her) Oh! Carconte!

La Car. Let me look at it, let me look I say. (They go off. 1. 2 E.)"

Dumas' Dram. Act III, Part II, page 18.

London Daily Telegraph, Oct. 19, 1868.

Act 3, Scene 1, pages 42 and 43
French-Lacy version:

"Cade: Well, give me the money, and take the diamond.

Joannes: There, then. (Producing pocket book, and offering notes." (p. 43)

Novel page 349.
La Carconte lights a candle. (page 350 Novel.)

Act III, Scene I, page 43. French-Lacy version:

"Joannes (Producing a brace of small pistols) I am prepared for robbers." *

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* * (p. 43.)
 "Joannes: (Taking lamp from table)
 Once more good night, then. (going
 towards the staircase" (p. 45)
 Joannes ascends stairs and disappears.
 Part 2, Act 2, Scene 1, pages 25 and
 26 Dumas' dramatization.
 Scene 8, Joannes, Caderousse, and La
 Carconte, pp. 28, 29, 30. Dumas' dram-
 atization.

84: Attic room.

85: Noirtier shown in.

86: Inn:

87: LaCarconte takes axe
 from mantelpiece.

DeVillefort urges La Carconte to as-
 sassinate the peddler. London Daily
 Telegraph Oct. 19, 1868.
 Caderousse is garroted.

Act II, Part II, page 31, 32, Dumas'
 dramatization.

"Caderousse: (seizing hatchet.) Then,
 since you wish it.

LaCarconte: Come along.
 (They go up stairs * * * A scream
 is heard, the sound of a struggle, a pistol
 shot, LaCarconte appears bleeding and
 falls on the staircase.)"

LaCarconte takes a knife.

French-Lacy, p. 46.

French-Lacy version, Act 4, Scene 1.
 page 46:

"Cade: (seizing a hatchet from L.)
 Well! since you will have it so.—

La Car. Good, come on! (They steal
 up the stairs. L. A. Carconte leading,
 a pause, then a loud cry—heavy blows,
 and the report of a pistol. LaCarconte
 appears on top of staircase, bleeding,
 totters down and falls on stage dead.)
 (p. 46)

Page 350 Novel. A body fell on the
 staircase.

London Daily Telegraph, 1868.

French-Lacy Version, p. 88.

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89: Exterior of Inn.

90: Interior of Inn.

91: Reception room.

Dantes, as the Abbe appears at the
 c. door—tableau.
 London Daily Telegraph.
 French-Lacy Version, p. 88.

London Daily Telegraph, "One."

Description of Mercedes, Novel, page
 319.

Description of de Morcerf, Novel,
 pages 320-321.

Act II, Part III, page 1, Dumas' dram-
 atization:

"At the house of Mrs. de Morcerf. A
 conservatory magnificently lighted."

Scene I, Mercedes, Albert, Mrs. Dang-
 lars and a group of talkers at back.
 (p. 1)

French-Lacy, p. 46.

Part III, Act 2, scene 3, page 5
 Dumas' dramatization.

French-Lacy, p. 47.

London Daily Telegraph.

Mercedes and Monto Cristo talking in
 conservatory.

Page 10 of Part III, Act 2, Dumas'
 dramatization.

Mercedes offers grapes to Monte Cris-
 to, but he refuses same. (pp. 10-11)

French-Lacy, p. 63.

Does not appear in plaintiff's play.

Part 3, Act 3, page 10, 14, Dumas'
 dramatization.

"Monte-Cristo: Ah, you are trying to
 quarrel with me, Viscount, I see that;
 but take my advice and remember it well;
 it is a bad habit to make a noise while
 provoking; the noise does not reach
 everybody, Mr. de Morcerf.

92: Monte Cristo is an-
 nounced.

93: Conservatory.

94: Dantes charges Fernand
 as the betrayer of Hay-
 dee's father.

95: Albert takes up quarrel.

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Albert: Oh! (He makes a gesture as if to throw his glove in the face of Monte Cristo but Beauchamp stops his arm; the glove falls at the feet of Monte-Cristo.)

Monte-Cristo: Sir, I retain your glove to throw and tomorrow morning I shall return it to you rolled around a bullet."

Part III, Act IV, page 2 Dumas' dramatization:

"Mercedes: Edmond, you will not kill my son?"

French-Lacy, p. 72-73.
London Daily Telegraph.

Part III, Act 4, page 9.
Seventh Tableau. Dumas' dramatization.

The Woods at Vincennes.

Albert apologizes.

pages 14-15.

"Albert: And now, sir, if you find that the excuses which I have just made are sufficient, your hand I beg of you."
* * *

Monte-Cristo: Here is my hand sir, but for you, you hear, for you alone, (low) and for your mother." (pp. 14-15)

Morcerf picks up the quarrel.

Act 5, pages 20, 21, 22. Dumas' dramatization:

"Morcerf: (Terror-stricken) Edmond Dantes! (He flies into the room at the side. A pistol shot is heard. Monte Cristo dashes out, looks and gives a scream.)" (p. 22)

French-Lacy version, Act 5, Scene 2, page 75.

Duel between Fernand and Monte Cristo.

"Fernand: * * * But it is your real name that I demand. (pacing the stage, Monte Cristo hurries off. C. D.) Your true name that I would know, that I may pronounce it aloud, before the witnesses

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to our duel, at the moment that my sword shall penetrate your heart. (stopping, L., and missing Monte Cristo.) Ah! he escapes, he flies me, (drawing his sword) he shall not, he shall not! (rushing up to center doors, he is met by Monte Cristo, who has cast aside his black velvet morning gown, and has on the sailor's jacket and hat of the first act. Fernand L. is petrified with terror." * * *

Fernand: (in the utmost terror) Edmond Dantes! Dantes, whom I buried in a living tomb—thou art not human, but a devil—whom I will send to his native hell! (he attacks Dantes, a fierce and rapid combat. Fernand is disarmed, and pierced through, falling at back, C. between the doors which open on the stage.)

Dantes: Thus falls the last and worst of my enemies—Peace now and good will to all mankind, for the vengeance of Monte Cristo is no more. (He closes the C doors, concealing the body.)

(Pages 76-77.)

Scene IV, Act V, page 23, Dumas' dramatization:

Monte Cristo embraces Albert.

"Monte Cristo: Oh! (He opens his arms.)

Mercedes: Albert in the arms of Dantes . . . Oh, my God, I thank you, for I have seen what I never hoped to see. Come, Albert, Farewell, Edmond."

(p. 23.)

London Daily Telegraph.

DESCRIPTION OF CHARACTERS:

NOIRTIER,	p. 26, Act II Part I, page 41.
CADEROUSSE,	Novel, page 17.
MERCEDES,	Novel, " 21
FATHER DANTES	Novel, " 21
DANGLARS	Novel, " 34
DANTES	Novel, " 11
VILLEFORT	Novel, " 22
FRENCH-LACY	Novel " 49
	Novel " 78

French Lacy

96: Duelling ground.

Stipulation as to Exhibits

In the French-Lacy version the dramatization is divided into five parts:

- 1: The Conspiracy.
- 2: The Prison of the Castle d'If.
- 3: Pont Du Gard.
- 4: The Mansion of Count DeMorcerf.
- 5: Reconciliation between Mercedes and Monte Cristo.

Stipulation as to Exhibits

NEW YORK SUPREME COURT

APPELLATE DIVISION—FIRST DEPARTMENT

JAMES O'NEILL,
Plaintiff-Respondent,
against
GENERAL FILM COMPANY,
Defendant-Appellant.

IT IS HEREBY STIPULATED AND AGREED that upon the argument of the appeal herein the parties hereto may, with the permission of this Court, submit the following original exhibits and refer thereto as if printed at length in the papers on appeal, viz.:

Plaintiff's Exhibit A—Manuscript of play "Monte Cristo" by Charles Fechter.

Plaintiff's Exhibit D—Translation of the novel "The Count of Monte Cristo," by Alexandre Dumas, published by The Platt and Peck Co., New York.

Stipulation as to Exhibits

Defendant's Exhibit 5—"Monte Cristo" in five (5) Acts, known as French's (late Lacy's) Acting Edition.

Defendant's Exhibit 6—Volumes XII and XIII of the Theatre Complet, being "Monte Cristo" Part I, "Monte Cristo" Part II, Le Comte de Morcerf, "Monte Cristo" Part III, Villefort "Monte Cristo" Part IV; being Alexandre Dumas' dramatization of his novel entitled "The Count of Monte Cristo."

Defendant's Exhibit 7—The English Translation of Part I, Acts I, II, III, IV and V; Part II, Acts I, II, III, IV and V; Part III, Acts I, II, III, IV and V, of Alexandre Dumas' dramatization of his said novel "The Count of Monte Cristo."

Defendant's Exhibits 9 and 10—Pictorial Posters of Scenes from the play "Monte Cristo."

Defendant's Exhibits 11, 12, 13, 14, 15, 16, 17, 18 and 19—Flashlight photographs of different scenes of play "Monte Cristo."

Defendant's Exhibit 20—Copy of play "Monte Cristo" referred to in deposition of Herbert Trendell, p. 137 of this record.

Dated, New York, June 17, 1915.

DITTENHOEFER, GERBER & JAMES,
Attorneys for Plaintiff-Respondent.

NATHAN BURKAN,
Attorney for Defendant-Appellant.

Opinion of the Court

O'NEILL V GENERAL FILM CO.

SPECIAL TERM, PART 5

SHEARN, J.:

Plaintiff seeks a judgment enjoining the defendant from exhibiting by means of motion pictures the scenes or incidents of a play or dramatization, known as the Fechter version of the "Count of Monte Cristo" and for an accounting. In or about the year 1844 Alexander Dumas wrote the novel "Count of Monte Cristo," which was published by him in France and in this country, in two volumes consisting of about 600 printed pages in each volume, having about 70 characters, with a wealth of romantic scenes and incidents. About 1848 Dumas dramatized his novel under the title "Monte Cristo" in the French language and published same. His dramatization consisted of four parts, each covering 122 to 144 printed pages, with 20 acts, 37 tableaux, 221 scenes and 59 characters. The play in this form was of course impossible for dramatic purposes. In October, 1868, one Benjamin Webster, manager of the Adelphi Theatre, Strand, London, deposited in the Lord Chamberlain's office a drama or play printed in book form under the title "Monte Cristo" written by one Charles Fechter. In this dramatization, Fechter selected portions of the novel which he deemed valuable for dramatic purposes, disregarding and eliminating over 55 of the characters appearing in the novel, and many hundreds of the scenes and incidents therein. Fechter

Opinion of the Court

changed many of the characters, reconstructed the scenes, transposed and epitomized some of the incidents found in the novel, and created an original work, concentrating his literary creation so as to permit of the performance upon the stage within the limits of an evening performance, which required ability of a high order as a dramatist and originality and much skill. The Lord Chamberlain filed same in his office and issued to Webster a license authorizing him to give on the 19th day of October, 1868, a public representation of the drama, which was given at the Adelphi Theatre on said date pursuant to the license. Prior to the year 1870 a dramatization of the novel was made and published by one Thomas H. Lacy, and was called "Lacy's Acting Edition," which version was republished by Samuel French under the title "French's Acting Edition (Late Lacy's)". French's Acting Edition consisted of five acts, 17 scenes, 26 characters, and closely followed the novel. This version was long and cumbersome and its production was not continued. Prior to 1883, Fechter, assisted by one Arthur Leclercq, wrote a further condensation of his dramatization of the novel for stage production, which thereafter became known as the Fechter version of Monte Cristo. This dramatization is the only one of the novel which has been performed with success. The Fechter version was kept in manuscript form, and has never, at any time, been printed and published or dedicated to the public. Fechter gave public performances of the drama from his version from 1873 to the time of his death in 1879. Some of the performances were at the Globe Theatre, Boston, which was

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owned by one Cheney. John Stetson succeeded Cheney as the proprietor of the Globe Theatre, and came into possession, from Cheney, of the Fechter manuscript. Stetson was in possession of the manuscript in 1883 and produced the play with great success, the plaintiff herein being the leading actor, and playing the part of Edmond Dantes, known in the latter part of the play as the Count of Monte Cristo.

911 In June, 1885, plaintiff purchased, for \$2,000.00, from Stetson the Fechter version of the play and Stetson delivered to the plaintiff the manuscript, which has ever since been in the possession of the plaintiff. At the time of the purchase of the play, Stetson delivered to the plaintiff with the manuscript a bill of sale or transfer of the title of the play and manuscript from Stetson to the plaintiff. Ever since 1885 plaintiff has been in the continuous, uninterrupted, open possession of the play, and the manuscript thereof, and has performed upon the stage in the various cities of the United States the play known as the Fechter version more than 5,000 times, by reason of which 912 plaintiff has become identified with the play, and has made it famous, the play being the principal and almost the only dramatic production in which the plaintiff has appeared since 1885. The right and title to the play of the plaintiff has never been questioned and royalties have been received by and paid to the plaintiff from others who have sought and acquired from him a license to give performances, which royalties have continued down to and since the commencement of this action. The plaintiff has enforced, by suits, his right and claim against persons who undertook

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to give a performance of the play without his consent or license, and the Courts have upheld, protected and recognized his right and title to the play, which has been a great artistic and financial success, and is of great value to the plaintiff. The defendant is engaged in the business of furnishing films of photo plays to managers and proprietors of motion picture theatres to enable them to give public theatrical performances of photo plays at the theatres of its licensees for profit. Prior to the commencement of this action the Selig Polyscope Company prepared for the defendant a motion picture film of a play 914 called "Count of Monte Cristo," the films of which the defendant distributed and leased to exhibitors of motion picture films for production and representation throughout the United States. It is claimed that such motion picture play was prepared from and is an appropriation of the plaintiff's Fechter version and infringes upon plaintiff's common law property right therein. Defendant resists plaintiff's claim of title and 915 claims that the motion picture play was produced by resort to original sources, alleged to be open to all, namely, the novel and the dramatic versions antedating the Fechter version, and that in so far as there is any similarity between the motion picture play and the Fechter version, it is lawful and proper in that the similar incidents and characters are found in the novel and earlier versions.

The Court has examined the novel, the Dumas dramatization, the Webster (or first Fechter version), the French or Lacy versions, the Fechter versions, and has, by arrangement with and in

the presence of counsel for both parties, witnessed a representation of the defendant's motion picture play. Inextricably interwoven into the photo play are the principal and most striking incidents original with the Fechter version and found only in the Fechter version of the play. A person witnessing a performance of the photo play, and familiar with the Fechter version, will readily recognize it and the story as told in the Fechter version is told in the photo play in substantially the same order and sequence. Over 917 fifty of the characters omitted from the novel by Fechter in preparing his version are also omitted in the photo play. Scenes selected from the novel by Fechter are used in the photo play in the same way and as used in the Fechter version, and the scenes omitted in the Fechter version are omitted in the photo play. Words used only in the Fechter version and not found in the novel are flashed upon the screen in connection with the performance of the photo play and are a part of the films used to give the exhibition, and said words are used by the characters and in connection with incidents originated by Fechter in his dramatization, and not found in the novel, as used in the Fechter version. While there are in the photo 918 play, and especially in the earlier part, scenes that are not found in the Fechter version, practically every great dramatic climax, original in the Fechter version and not found in the novel or in any of the earlier versions, is reproduced in the photo play. It would extend this opinion to undue length to set forth in detail an analysis of these striking similarities. A comparison of the Fechter version and the photo play with one

another and with the novel and earlier versions leaves no doubt that the Fechter version was used for the production of the photo play and that in the photo play the defendant has appropriated that which gave the Fechter version its dramatic value and its success. The learned counsel for the defendant has, with industry and skill worthy a better cause, prepared an elaborate analysis pointing out innumerable instances of scene and incident in the photo play that are to be found in the novel and in the earlier versions, and many that are not found in the Fechter version. 920 It is of course not unnatural that these instances of similarity between the photo play and the novel and the other dramatic versions, including Fechter's, should exist, and proves nothing, for Fechter's version was dramatized from the novel, though changed, rearranged, condensed and strengthened as above noted. In a case of this sort what attention should be focused upon are the striking instances of similarity between the photo play and the Fechter version that are found in the novel or in the earlier versions. 921 Where, as here, a party charged with literary piracy claims to have gone to the common source and does not produce the man who did the work for him, so that he may be cross-examined as to the sources from which he took his work and account for the singular coincidences found in the piratical copy and complainant's work, a Court of Equity needs little additional proof on the question of piracy. If characters, incidents, omissions or additions are found in the complainant's dramatization, not found in the published book or common source, then in the absence of a

convincing explanation, the Court is justified in finding, and invariably does find, that the complainant's work has been infringed (*French vs. Connelly*, 1 Week. Dig., 196; *Frank Shepard Co. v. Taylor Pub. Co.*, 193 Fed., 991; *White v. Bender*, 185 Fed., 921, 925). We come then to the defendant's technical defenses. It is asserted that the plaintiff cannot recover because he has not shown his exclusive ownership of the Fechter version. Irrespective of the evidence afforded by Stetson's declarations when he sold the play to the plaintiff, and the presumptions arising from the relations of his predecessor Cheney with Fechter, and the production of the play by Cheney and Stetson at the Globe Theatre, the plaintiff, coming rightfully into possession of the play from the ostensible owner and its only producer in 1885, and having been for thirty years in continuous and open and notorious possession of the play, and having throughout said period successfully maintained exclusive right thereto against the world, has valid title to the play by adverse possession. In *Lightfoot v. Davis*, 198 N. Y., 261, the Court said at p. 265:

"We have in our state, however, no statute relating to the adverse possession of chattels or personal property, nor do I know of any in any other state. Nevertheless, it seems to be the generally accepted doctrine that by adverse possession title to chattels may be acquired which will be paramount to that of the true owner. Though there are no decisions in our Courts on the question they are numerous in other jurisdiction. (*Brent v. Chapman*,

5 Cranch., 358; *Layne v. Norris*, 16 Gratt. (Va.), 236; *Newby v. Blekey*, 3 Hen. & Mun. (Va.), 57; *Dagroo v. Cooper*, 72 Ky. (9 Bush.), 629; *Carr v. Barnett*, 21 Ill. App., 137; *Gaillard v. Hudson*, 81 Ga., 738; *Connor v. Hawkins*, 71 Tex., 582; *Chapin v. Freeland*, 142, Mass., 383). In *Campbell v. Holt* (115 U. S., 620), in discussing the power of the legislature to revive an outlawed debt by repeal of the Statute of Limitation, Judge Miller wrote: "Possession has always been a means of acquiring title to property. It was the earliest mode recognized by mankind of the appropriation of anything tangible by one person to his own use, to the exclusion of others, and legislators and publicists have always acknowledged its efficacy in confirming or creating title. The English and American statutes of limitations have in many cases the same effect, and, if there is any conflict in the decisions upon the subject, the weight of authority is in favor of the proposition that, where one has had the peaceable, undisturbed, open possession of real or personal property, with an assertion of his ownership, for the period which, under the law, would bar an action for its recovery by the real owner, the former has acquired a good title—a title superior to that of the latter, whose neglect to avail himself of his legal rights has lost him his title. This doctrine has been repeatedly asserted in this Court (*Leffingwell v. Warren*, 2 Black., 509; *Croxall v. Shererd*,

5 Wall, 268, 289; *Dickerson v. Colgrove*, 100 U. S., 578, 583; *Bicknell v. Comstock*, 113 U. S., 149, 152).’ ”

Title in that case was held to be a bar to an action for the recovery of the chattel by the real owner. Here, an infringer, who makes no claim of ownership, attacks the title. In *Monnot v. Murphy*, 207 N. Y., 240, the Court went so far as to hold that an invalid title is as effectual, as a constituent of the notice to the rightful owner that the occupation under it is in defiance of his title, as a valid claim; and that possession with acts of ownership, raises a presumption of title. Property in a manuscript or in the literary production embodied therein is not distinguishable from any other personal property. It is governed by the same rules of transfer and succession, and is protected by the same process, and has the benefits of all the remedies accorded to other property, so far as applicable. Defendant's next proposition is that the performance of the Webster (or first Fechter) version in England on October 19, 1868, was a publication which destroys the common law rights in a manuscript play in this country. There is the highest authority against this contention (*Ferris v. Frohman*, 223 U. S., 424). Defendant next contends that the filing of the play by Webster with the Lord Chamberlain for the purposes of censorship was a publication of the work. The statute made it obligatory on every manager of a theatre (not owner of a play), to deposit a copy of every play, before a performance could be given, for purposes of censorship. No one has a right to make a copy of the play, as has been testified to by the representative of the Lord Chamberlain.

“Such a delivery of copies of a literary production is not a publication, and could not prejudice the owner's common law rights” *Press Pub. Co. v. Monroe*, 73 Fed. Rep., 196, 198).

It would be most unreasonable to hold that a person who is compelled, under the law, to submit his play to censorship before production, thereby loses title to his play. In *Jewelers' Mercantile Agency v. Jewelers' Pub. Co.*, 155 N. Y., 241, referred to by counsel, the book of the plaintiff had been published and was delivered generally to subscribers and anybody could subscribe and get a copy of the book, which the Court held constituted publication. After publication in that form, the common law right was gone. Defendant next seeks to escape by claiming that the plaintiff surrendered his rights to the public by putting out pictorial posters of many of the striking scenes in the play for advertising purposes. This is not to be regarded very seriously. A dramatic composition is a work in which the narrative is told by dialogue and action, and the characters go through a series of events which tell a connected story. It may be a pantomime, and the story told in action, but to make it a dramatic composition, it must tell a connected story or a series of events (*Daly v. Palmer*, 6 Blatch, 256; *Daly v. Webster*, 56 Fed., 483). If that dramatic representation is published without statutory protection, the play becomes common property. A mere advertisement—a mere pictorial inducement or invitation to witness a performance—does not tell the story of the play as the actors do. It is not the story told in action,

and it is not the story told in print. Therefore, it is not a publication of the play or story. The construction of "a publication," under the Copyright Law, is the same as of a publication in dealing with the common law rights in a manuscript play, and "the publication referred to in the statute" is an edition offered to the public for sale or circulation (*Falk v. Engraving Co.*, 54 Fed., 890. See, also, *Werkmeister v. Springer Lithographing Co.*, 63 Fed., 808). Finally, defendant contends that plaintiff having, since the commencement of the action, consented to a motion picture reproduction of the Fechter version by the Famous Players Film Company and to the copyright by said company, pursuant to the copyright Act of 1909, as amended August 24, 1912, of the motion picture play, has lost his common law rights in the manuscript play. The motion picture representation by the Famous Players Film Company is made by that company as licensee of the plaintiff. The amendment of August 24, 1912 protects motion picture photo plays, and provides that "a title and description, with one print taken from each scene or act" must be deposited with the Librarian of Congress. Plaintiff's licensee, recognizing plaintiff's rights, merely protected the films, which are its property and creation, in the way the Copyright Law permitted it to do. Had it not done so, it could not successfully prosecute pirates who might duplicate or copy the films. No reason is apparent why the plaintiff should thereby lose his common law rights in his play. Judgment for plaintiff for an injunction and an accounting, with costs.

Stipulation Waiving Certification

Pursuant to Section 3301 of the Code of Civil Procedure, It is HEREBY STIPULATED that the foregoing consists of a true and correct copy of the notice of appeal, the judgment roll, case and exceptions as settled, and the whole thereof now on file in the office of the Clerk of the County of New York, and certification thereof by the Clerk pursuant to Section 1353 is hereby waived.

Dated, New York, October 5, 1915.

NATHAN BURKAN,
Attorney for Defendant-Appellant.

DITTENHOEFER, GERBER & JAMES,
Attorneys for Plaintiff-Respondent.

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Stipulation Settling Case

It is HEREBY STIPULATED that the foregoing case contains all the evidence given and all the exceptions taken upon the trial of this action, and that the same may be settled and ordered on file and annexed to the judgment roll herein.

Dated, New York, October 5, 1915.

NATHAN BURKAN,
Attorney for Defendant-Appellant.

DITTENHOEFER, GERBER & JAMES,
Attorneys for Plaintiff-Respondent.

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Order Settling and Filing Case

On the above stipulation, the foregoing case on appeal containing all the evidence and all the exceptions is hereby settled and ordered on file.

Dated, New York, October 10, 1915.

CLARENCE J. SHEARN,
J. S. C.

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Order Filing Record in Appellate Division

Pursuant to Section 1353 of the Code of Civil Procedure, it is ORDERED that the foregoing printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court in the First Judicial Department.

Dated, New York, October 10, 1915.

CLARENCE J. SHEARN,
J. S. C.

PRESS OF FREMONT PAYNE, 47 Broad St.—Phones, 2277-78-79 Broad.

To be Argued by.
NATHAN BURKAN.

Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT.

JAMES O'NEILL,
Plaintiff-Respondent,

against

GENERAL FILM COMPANY,
Defendant-Appellant.

BRIEF FOR APPELLANT.

Statement.

This is an appeal by defendant from a judgment of the Supreme Court rendered in favor of the plaintiff after a trial at the New York Special Term.

The judgment appealed from enjoins the defendant from producing, exhibiting or distributing any motion film containing any of the scenes or incidents of the plaintiff's play which is described as the Fechter version of "The Court of Monte Cristo."

In the complaint it is alleged that the play is a dramatization of Alexander Dumas' novel "The Count of Monte Cristo," that it was made in Boston in the year 1870-1871, by Charles Fechter, assisted by Arthur LeClercq, while in the employ of Arthur Cheney; that it became the property of Arthur Cheney; that Arthur Cheney assigned it to John Stetson; that John Stetson assigned it to the plaintiff, and that it was never published or copyrighted (fols. 12-17).

It is further alleged that the defendant without plaintiff's permission distributed certain motion pictures made by the Selig Polyscope Company, which pictures represent the same characters, scenes and incidents as the said play (fols. 19-24).

The plaintiff claims the sole right, not only to give dramatic performances of the play, but also to give motion picture exhibitions thereof (fol. 25).

It is alleged that a motion picture reproduction of the play has in fact been made by the Famous Players Motion Picture Company under a contract with the plaintiff, and that the plaintiff intends to exhibit said motion picture reproductions of his play (fols. 25-27).

It is alleged that the exhibition of motion picture reproductions of the play not authorized by plaintiff will irreparably injure plaintiff's right to give motion picture exhibitions of his play (fol. 28).

The answer pleads a general denial and three affirmative defenses. In these defenses it is alleged that the alleged Fechter version was not an original work, but was made up by copying and adapting the ideas, characters, dialogues, incidents, scenery, costumes and atmosphere of Dumas' novel and of numerous translations and dramatizations there-

of which were public property (fols. 44-48); that the said Fechter version has been dedicated to the public by the publication and circulation of illustrations, posters and prints depicting all the important scenes and incidents of said version (fols. 49-53); that the defendant's motion pictures are taken from sources that are public property, including the novel, the dramatizations thereof and the posters and illustration of the Fechter version, and that the plan of defendant's pictures is materially different from the plaintiff's play (fols. 55-57).

Another defense was added by an amendment allowed on the trial to the effect that this Court has no jurisdiction because the plaintiff's play was reproduced in motion pictures and such motion picture reproduction was duly copyrighted pursuant to the copyright statutes of the United States (fol. 538).

The allegations of the complaint and the nature of the evidence introduced on the trial show that the object of the action was not to protect the right of the plaintiff to produce his play with living actors, but to protect the motion picture reproduction of the play which had been made with the authority and personal participation of the plaintiff before the commencement of this action.

In paragraphs XIII and XIV of the complaint it is alleged that the plaintiff has contracted with the Famous Players Motion Picture Company, manufacturers of motion picture films, for exhibitions of motion picture reproductions of his play, that under said contract the plaintiff with a company of actors and actresses engaged by him for that purpose gave performances of said play for the purpose of having motion picture films made thereof and that motion picture films thereof were made by the Famous Players Motion Picture Company (fols. 25, 26).

On the trial it was shown and the Court found that the contract with the Famous Players Motion Picture Company was made and the said motion picture film of plaintiff's play was completed prior to November 1st, 1912, and that it was released for distribution and circulation on November 1, 1912 (fols. 126-128).

The said motion picture reproduction of plaintiff's play was copyrighted by publication (fol. 129).

This copyright was registered in the name of the Famous Players Motion Picture Company which derived its right to make said motion picture version from said contract made with the plaintiff prior to November 1st, 1912.

This action was commenced on November 18th, 1912, that is in the interval between November 1st, 1912, the date of the release of said motion picture version, and the date of the copyright registration.

But at the time of the commencement of this action the motion picture rights in plaintiff's play had been transferred to the Famous Players Motion Picture Company, including the right to copy-right a motion picture version thereof, and such motion picture version had been completed and released for distribution.

The Famous Players Motion Picture Company was in a position on November 1st, 1912, to claim copyright in the motion picture version of plaintiff's play and to proceed under the copyright laws of the United States against any infringer of the motion picture rights in the play.

If the Famous Players Motion Picture Company had brought an action under its copyright against the defendant, the same relief could have been claimed as is claimed in this action.

But in a copyright action the plaintiff would have been required to establish certain conditions precedent, including the originality of the plaintiff's play and a perfect chain of title from the author to the plaintiff to the exclusive rights in the play, which could not be established and have not been established in the case at bar.

In a copyright action strict proof of plaintiff's right is required; where any person other than the author brings the suit, the plaintiff must show how he became the proprietor and that he is the grantee of the author (*Chicago Music Co. vs. Butler Co.*, 19 F., 758; *Caliga vs. Inter Ocean Newspaper Co.*, 157 F., 186; *Saake vs. Lederer*, 174 F., 135).

In this action the plaintiff claims to be proprietor of a play of which Charles Fechter is alleged to be the author.

There is no evidence of Fechter's authorship.

There is no evidence showing a clear chain of title from Fechter to the plaintiff.

According to the complaint the chain of title was as follows:

Fechter, assisted by *LeClercq*, made the dramatization in Boston in 1870-1871.

Cheney acquired it from *Fechter* and *LeClercq*.

Stetson bought it from *Cheney*.

O'Neill bought it from *Stetson*.

There is no finding showing how the title to the play passed from *Fechter* and *LeClercq* to *Cheney* and from *Cheney* to *Stetson*.

The findings show affirmatively that no exclusive rights in the play passed to *Stetson*.

The right here involved is the exclusive performing right.

The Court found "that there is no evidence that *Arthur Cheney* owned the exclusive right to publicly perform said play, *Exhibit A*" (fol. 148).

If Cheney did not own the exclusive performing right, he could not assign it to Stetson and Stetson could not assign it to the plaintiff.

The plaintiff testified that Stetson gave him a bill of sale reading substantially as follows:

"I have this day for value received sold all my right, title and interest in my play of *Monte Cristo* purchased by me from Mr. Arthur Cheney to James S. O'Neill, to be his property and his heirs' for all time" (fol. 202).

This bill of sale does not establish plaintiff's title. It purports to sell to plaintiff whatever right Stetson had acquired from Cheney. And Cheney was not shown to be the owner of the exclusive performing rights.

The fact that a manuscript of the play was in Stetson's possession furnished no basis for an inference that the transfer of this manuscript conveyed exclusive rights in the play.

For, it was shown that this manuscript was not the only manuscript in existence and in actual use.

The Court found that Fechter had another manuscript in his possession from 1873 to the time of his death in the year 1879, and gave public performances thereof during all said period (fol. 122).

Nor was the manuscript which Stetson delivered to plaintiff the original manuscript written by Fechter.

While Fechter is alleged in the complaint to have written his version in the year 1870-71 (fol. 12), the manuscript which Stetson had in his possession was not made until after August 31st, 1877 (fol. 146).

And the Court found that this manuscript "is typewritten and was not written by Charles Fechter or Arthur LeClerc" (fol. 145).

There was another fact found by the Court which shows that the plaintiff never could have acquired the exclusive performing right in those incidents and features of the Fechter version of *Monte Cristo* to which the defendant is charged with having appropriated.

There was an earlier version, Defendant's Exhibit 20, which was produced by Benjamin Webster, the manager of the Adelphi Theatre in London, in said theatre in October, 1868.

The Court found that the Webster version contains all the features of the defendant's pictures complained of by the plaintiff. And there is no claim that the plaintiff acquired that version (fol. 137).

In view of this lack of evidence of plaintiff's exclusive rights in the play no case could have been made out in a copyright action brought either by the plaintiff or by his assignee.

This being an action based upon plaintiff's common law right of literary property, the plaintiff has been allowed the benefit of a method of establishing his title which would not have been available in a copyright action brought in the United States Courts. The Court held that the principle of adverse possession was applicable to literary property and that as plaintiff had purchased John Stetson's manuscript of the play in the year 1885, and as said purchase was evidenced by a bill of sale and plaintiff had been in continuous, uninterrupted, open possession of the play and the manuscript thereof, his title was sufficiently established (fols. 911-913).

The plaintiff was also permitted to introduce in evidence a paragraph of the complaint in an action in the Supreme Court between John Stetson, plaintiff, and James B. Studley, defendant, wherein it is alleged that John Stetson purchased the play

from Arthur Cheney and became the sole and exclusive owner thereof (fols. 318-322, page 198). The admissibility of this evidence has been claimed under Section 955 of the Code of Civil Procedure. No such evidence would have been admissible in a copyright action.

The defendant contends that the plaintiff cannot avail himself of any common law rights of property in the play after he caused to be published and copyrighted a motion picture version of it, and, further, that after such copyrighting no part or feature of the work so copyrighted can be protected by an action in this Court. Such protection can only be sought in the United States Courts.

POINT I.

The plaintiff having authorized the copyrighting of a motion picture reproduction of his play, protection against infringing motion pictures can only be had under the copyright statutes in the United States Courts. This Court has no jurisdiction to grant the relief sought in this action.

The object of this action is to protect the motion picture rights in the plaintiff's play against an infringing motion picture film.

But whatever motion picture rights the plaintiff had as part of the common-law property in the play were placed at the disposal of the Famous Players Film Company for the purpose of making a motion picture reproduction of the play and of securing copyright therein. When these rights

were secured by copyright, the common-law motion picture rights of the plaintiff were extinguished.

Before this action was commenced the motion picture reproduction had been completed, the plaintiff assisting in the making thereof, its completion was publicly announced and it was announced that it was protected by copyright.

The announcement of the motion picture contains this significant language:

"The production is completely protected by copyright and any violations or infringements will be prosecuted to the fullest extent of the law" (page 199).

The above announcement was published prior to November 1st, 1912, more than 17 days before the commencement of this action.

In the complaint herein which was verified on November 18th, 1912, the plaintiff identifies himself with the making of said motion picture reproduction, with the advertisements, the release and the intended exhibitions thereof. In paragraph XIII he alleges that he has contracted with the Famous Players Company for the giving of motion picture exhibitions of his play. In paragraph XIV it is alleged that plaintiff will cause these exhibitions to be given and that such exhibitions so given by him will be advertised and announced under the title of "Monte Cristo" (fols. 25, 26).

The copyrighting of said motion picture reproduction was perfected not later than December 10th, 1912.

It was copyrighted by publication.

The Court found that said motion picture film was adapted to reproduce the plaintiff's play (fols. 126-129).

"It has been settled by the decisions, under the earlier copyright laws, that the copyright of a dramatization covered a photo-play presentation of the same subject. This was based upon the recognition of what every observer experiences, the similitude, if not identity, of the impressions received from seeing a photo-play and from the same play acted out by actors living and moving before his eyes. The photo-play business may therefore be well said to bear the same relation to dramatic art which the theatrical business does. * * *

The moving picture business, as an entirety, is made up of the presentations, to which the public is invited, and of a trade in other things, which make this final display possible. If it is a photo-play, it has, of course, the same basis of the labors of the author and the art of the actor as has the acted play. The spectator of the play sees the actors acting out the play. That which the spectator of the photo-play thinks he sees is an illusion. He thinks he sees, for instance, a man moving (or a picture of it), and in one sense he does, because such is his mental impression of what is before him. This illusion is produced by projecting upon a screen in rapid succession, enlarged reproductions of a series of consecutively quickly taken photographs of a man as he is moving." * * *

United States vs. Motion Picture Patents Co., 225 Federal Reporter, page 803.

With the application for copyright registration of said film a description of the film was filed in

the Copyright Office (fol. 130; Defendant's Exhibit 4, pages 203-207).

The description shows that the film reproduces the plaintiff's play.

If the defendant's pictures contained the characters, scenes and incidents of the plaintiff's play, they also contained the characters, scenes and incidents of the copyrighted motion picture film.

If the defendant's pictures infringe any exclusive right in said characters, scenes and incidents, they infringe the exclusive right therein secured by the copyright in the film reproduction of plaintiff's play.

To enjoin the exhibition of defendant's pictures as infringements of any exclusive right in said characters, scenes, and incidents, means to enforce an exclusive right secured by the copyright laws.

The owner of the copyrighted pictures, the Famous Players' Motion Picture Company, may bring an action against this defendant for alleged infringements of its copyright and in such action the defendant could not plead the judgment rendered in the case at bar or its satisfaction as a bar.

When an exclusive right in said characters, scenes and incidents was secured by the copyrighting of the film, it was upon condition that such monopoly shall be for a limited time only and that the unlimited common-law right be abandoned.

"The common law ends when the statutory right begins."

Caliga vs. Inter Ocean Newspaper Co., 157 Fed., 186, 188; affd. 215 U. S., 182.

"The plaintiff cannot have at the same time the benefit of the copyright statute and also retain its common-law rights. No proposition

is better settled than that a statutory copyright operates to divest a party of the common-law right."

Jewelers' Mercantile Agency vs. Jewelers' Pub. Co., 155 N. Y., 241, 247.

In the *Jewelers'* case the Court dealt with an attempt, similar to the one made in the case at bar, to retain the unlimited monopoly of the common-law right while at the same time steps had been taken by reason of which the benefits of statutory copyright could be claimed. In the opinion of the Court it is said:

"It has not hitherto been understood to be the law that the common-law right could be so utilized as to secure to an author or publisher a continuing revenue from the public for a much longer period of time than Congress has been willing to grant to him the exclusive right to publish" (155 N. Y., at page 250).

The plaintiff in that case had deposited the title of its reference book and two copies in the Copyright Office, but it claimed that it still retained the common-law right in the book because the book had never been published, copies having been lent only to subscribers on condition that the contents should remain confidential and title in the books should remain in the plaintiff.

The Court held that the delivery of the book to subscribers was a sufficient publication to perfect the copyright and terminate the common-law right.

In discussing the question as to what manner of circulation constitutes publication, the Court

states principles of law which are applicable to the case at bar, as follows:

"When Coppinger and Scrutton, and Drone and Shortts, in their works on the subject of copyright, assert that, 'To constitute a publication it is necessary that the work should be exposed for sale or offered gratuitously to the general public so that any person may have an opportunity of enjoying that for which copyright is intended to be secured,' they did not intend to imply that the leasing of a book for a year or a term of years, to any and all persons who would accept it on such terms would not constitute a publication. * * * It is not necessary that the book be actually sold; *it is sufficient if it be offered to the public.* The act of publication is the act of the author, and cannot be dependent upon the act of the purchaser. The actual sale of a copy is evidence that it has been offered to the public, but that fact may also be shown by other evidence. It then asserts that if a book be offered gratuitously to the general public, it will constitute publication. This may be done by presenting it to public libraries, and this is so because the author or publisher by that act puts it in such a place that all the public may see it if they choose. The reason why exposing for sale or offering gratuitously to the general public constitutes publication, is stated in the last part of the rule as follows: 'So that any person may have an opportunity of enjoying that for which copyright is intended to be secured.' And this reason which lies at the foundation of all decisions upon this subject, is applicable to this situation. All persons

were given the opportunity of enjoying this book upon the plaintiff's terms" (id., pages 250, 251).

The view here expressed has been adopted in the copyright act of 1909. Section 62 defines the date of publication as the earliest date when copies were *placed on sale*, sold or publicly distributed.

In the case at bar the Court found as a fact that

"The said film adapted to reproduce in motion pictures said play, Plaintiff's Exhibit A, was released for distribution and circulation among exhibitors and motion picture theatres on the 1st day of November, 1912" (fol. 128).

To release the film for distribution and circulation meant to make it accessible to all members of the public who desired to secure it and that amounted to publication.

Under the authorities cited the actual publication of the film of plaintiff's play took place on November 1st, 1912.

As the film then offered to the public was the same that was copyrighted by publication it follows that the copyright dates from November 1st, 1912.

It is true that the date of publication given in the application for copyright registration is the 10th day of December, 1912 (page 201).

But that statement cannot change the legal effect of the release of the film for distribution and circulation on November 1st, 1912.

The plaintiff intended to claim in this action that he still held the common-law rights in the play and that the play had never been published or copyrighted.

It is fair to assume that the registration of the copyright of the film was postponed until after the commencement of this action and that the date of the first actual delivery of copies of the film was given as the date of publication instead of the date when it was offered for distribution.

But it is not material whether the release of the film was such a publication as would secure copyright.

If it was a publication, it destroyed the plaintiff's common-law right.

And furthermore, the plaintiff was not entitled to relief in this action even though he retained his common-law rights until a few weeks after the commencement of this action, if he had become divested of them on or before the trial.

In *Peck vs. Goodberlett*, 109 N. Y., 180, the Court held that the right to judgment in equity actions depend upon the facts as they exist at the close of the litigation.

To the same effect see:

Union Bag & P. Co. vs. Allen Bros. Co.,
107 A. D., at page 539.
Brown vs. Cole, 105 Supp., 197.

That there was a publication with plaintiff's consent of the film no later than December 10th, 1912, has been established (fol. 129).

To the extent to which the plaintiff's play was thus made public, plaintiff's common-law right ceased.

The Trial Court states that no reason is apparent why plaintiff because of the copyright in the film should lose his common-law rights in the play.

The right to reproduce the play in the form of a drama is not here in question. The defendant

is charged with distributing motion picture reproductions of the characters, scenes, incidents, costumes and scenery of the play.

All these features of plaintiff's play expressed in the same motion picture form were made public by plaintiff's licensee and are subject to copyright.

The right to express these identical features of the play in this identical motion picture form cannot be at the same time protected by the common-law right and by statutory copyright.

Universal Film Mfg. Co. vs. Copperman,
218 F., 577, 580.

Photo-Drama Motion Picture Co. vs. Social Uplift Co., 220 F., 448, 450.

In the Photo-Drama case the Circuit Court of Appeals of the Second Circuit expressly disaffirmed a dictum contained in the opinion of the District Judge to the effect that a man having general statutory dramatic copyright in a novel

"might make a play and perform it under his common-law rights without publication, or he might copyright the play, and he would still not have copyrighted or published his moving picture rights" (213 F., at page 377).

The Circuit Court of Appeals held:

"We do not concur in Judge Hand's holding that one who has obtained statutory copyright of a book or play has left in him any common-law right in literary property by virtue of Section 2 of the act. We think that section is intended only to indicate that the statute does not displace the common-law right. Whoever

elects to avail himself of the statute, however, must be held to have abandoned his common-law right" (220 F., at page 450).

POINT II.

The Court erred in holding that plaintiff's title to the exclusive rights in the Fechter Version was established by adverse possession.

The very nature of literary property makes it incapable of being acquired by adverse possession.

The decision in *Lightfoot vs. David*, 198 N. Y., 261, cited in the opinion of the trial court, speaks of *tangible* property, of personal property that is capable of exclusive possession.

The Court of Appeals, in the *Lightfoot* case, quotes from *Campbell vs. Holt*, 115 U. S., 620, as follows:

"Possession has always been a means of acquiring title to property. It was the earliest mode recognized by mankind of the appropriation of *anything tangible* by one person to his own use, to the exclusion of others. * * * Where one has had the peaceable, undisturbed, open possession of real or personal property, with an assertion of his ownership, for the period which, under the law, would bar an action for its recovery by the real owner, the former has acquired a good title—a title superior to that of the latter *whose neglect to avail himself of his legal rights* has lost him his title."

All this is inapplicable to the incorporeal, intangible right of literary property.

The owner of the literary property in a book does not lose it by neglecting to use it.

As long as he retains the common-law rights in it, he holds them perpetually, whether he uses them or not; if he secures copyright in the work, he holds that right for the statutory term, whether he makes use of it or not.

Drone on Copyright, page 100.

That literary property is not abandoned by non-user is well illustrated by the principles laid down in the case of letters. Although letters are sent to the person addressed for the purpose of being retained by the recipient, yet the literary property in their contents is not abandoned to the recipient, but remains in the writer. Although the writer may never publish or make use of his letter, the property in the contents will continue to be the writer's until his death and upon his death will pass to his executors or administrators. *Folsom vs. Marsh*, 2 Story, 100, 110, 111.

The nature of literary property is such that several may own and enjoy the same right and the enjoyment of it by one will not interfere with the enjoyment thereof by the other owners.

The theory of adverse possession that the rightful owner has abandoned the property by neglecting to assert his right, is shown to be inapplicable to literary property by the decision in *Carter vs. Bailey*, 64 Maine, 458, 463. The Court discussed the question as to whether one of several co-owners can require his co-owners to account for the benefits they have derived from their use of the copyright, and held:

"When one owner by exercising a right expressly conferred upon him in nowise uses or molests the right, title, possession or estate of

his co-owners or hinders them from a full enjoyment or sale and transfer of their whole property, we fail to perceive any principle of equity which would require him to account therefor."

One of several owners in common cannot claim any right as against his co-owners, hence his failure to assert any claim cannot diminish his own right nor add to the right of his co-owners.

The nature of intellectual property makes possible the simultaneous existence of a large number of manuscripts all containing the same work, but each in the possession of a different person.

Hence the rule, stated in *Rawley vs. Brown*, 71 N. Y., 85-89, and quoted in *Matter of Narganes*, 161 App. Div., 563-567, is applicable to this species of property, to-wit:

"If the custody and possession is shown to be equally consistent with outstanding ownership in a third person, as with the title in the one having possession, no presumption of ownership arises solely from such possession."

In *Kneller vs. Lang*, 137 N. Y., 589, the agreed statement of facts upon which the case was submitted contained the statement that there was an undisturbed possession of land for twenty years and upwards under a deed, but it did not expressly show that the possession was exclusive of any other right. The Court held:

"A statement in such case that a person was in undisturbed possession of land for twenty years and upwards under a deed is not sufficient to establish title by adverse possession as it does not necessarily follow therefrom

that *the entry and possession were exclusive of any other right*, and this is essential to constitute an adverse holding which will divest the owner of title after twenty years" (137 N. Y., 589, Syllabus).

The purchase or possession of a book or manuscript does not convey to the purchaser or possessor the incorporeal literary property in its contents.

"Even the transfer of the manuscript of a book will not at common law carry with it a right to print and publish the work, without the express consent of the author, as the property in the manuscript and the right to multiply the copies are two separate and distinct interests."

Stephens vs. Cady, 14 How, 528-530.

Curtis, in his Law of Copyright, says at page 87:

"Merely parting with the possession of a manuscript, or intrusting the possession to a third person are acts which do not carry with them proof of an intent to part with the ownership of the intellectual contents."

The decision in Stephens vs. Cady, 14 How, 528, was cited and followed in People vs. Roberts, 159 N. Y., 70-75, where the Court said:

"The property in the plates, instruments, books, etc., and the copyright secured to the author are altogether different and independent of each other. The latter, as an exclusive

right to the multiplication of the copies for the benefit of the author, or his assigns, is an *incorporeal right and has no physical existence.*"

In Publishing Company vs. Smythe, 27 Fed. Rep., 914-922, it is said:

"The purchaser of the paper, leather and twine does not necessarily purchase the literary property, and he cannot use his ownership of the one to defraud the author of his property in the other."

In the case at bar, the possession of the plaintiff's manuscript, Exhibit A, can furnish no basis for a finding that plaintiff owned the exclusive performing rights in the play.

The evidence shows and the Court has found that there were two dramatic versions of the Dumas novel Monte Cristo, both of which were known as Fechter versions.

The earlier Fechter version was made in London for the manager of the Adelphi Theatre, Benjamin Webster, and a printed copy of that version was deposited by Webster in the Lord Chamberlain's Office on October 17th, 1868 (fols. 133, 134).

This London version (Defendant's Exhibit 20) contains all of the plaintiff's play in so far as the defendant is charged with having appropriated it (fol. 137).

The plaintiff never acquired or had possession of the London version.

The second Fechter version was the play of which plaintiff purchased a manuscript copy in 1885 (fol. 121).

The earliest manuscript of that play traced in this action was a copy in the possession of Charles Fechter, the alleged author, since 1873 (fol. 122).

The manuscript purchased by plaintiff (Plaintiff's Exhibit A) *was a later copy*, which was typewritten and made after August 31st, 1877 (fols. 145, 146).

This manuscript was in the possession of John Stetson from August, 1877, to June, 1885.

While Stetson had this manuscript and performed the play, Charles Fechter continued to be in possession of the earlier manuscript and performed it until his death in June, 1879 (fol. 122).

There is no claim that the plaintiff ever acquired the manuscript which belonged to Fechter.

The manuscript was the subject matter of an action brought four years after Fechter's death by his widow, in which she claimed the exclusive ownership of the play (fol. 122).

The situation that existed with regard to the Boston Fechter version was the same as in a case where a play is owned by several owners in common.

In such a case, each of the co-owners can use the work without being liable to account to his co-owners. Each can give a valid license and make a valid transfer of his right to others. (Carter vs. Bailey, supra.)

The failure of one co-owner to assert his rights against the other owners, does not destroy his rights.

As neither co-owner has exclusive rights, neither can alone maintain an action against an alleged infringer.

In Nilsson vs. Lawrence, 148 App. Div., 678, this Court held that one of several owners in common of a play cannot maintain an action against one who produces the play without the individual consent of the plaintiff.

In the above case the defendants had no opportunity to show that they had any license from

any of the owners of the play; the objection that there were other owners besides the plaintiff and that the plaintiff had not shown sole ownership, was raised by demurrer.

The decision establishes the rule that the burden is on the plaintiff to establish his exclusive right and that a defendant who is charged with infringement can attack the plaintiff's title, although he does not establish any title or license in himself.

In this respect the Trial Court took a different view which affected the decision arrived at. After quoting from *Lightfoot vs. Davis*, supra, the Trial Court says:

"Title in that case was held to be a bar to an action for the recovery of the chattel by the real owner. *Here, an infringer, who makes no claim of ownership, attacks the title*" (fol. 928).

The question whether the defendant infringes a right exclusively owned by the plaintiff, may be raised by an alleged infringer.

If the law were otherwise, the burden would be shifted upon the defendant, and instead of plaintiff having to prove his right, the defendant would be required to establish his license before he could attack plaintiff's title.

Furthermore, one of the objections which was urged by the defendant, was that the performing rights in the play had fallen into the public domain. If that be so, the defendant as one of the public has a right to reproduce the play in motion pictures, and is not an infringer.

The Court found that the owner of the London Fechter version (from whom plaintiff does not claim to derive any rights) acquired statutory performing copyright therein on October 19th, 1868,

which expired either seven years after the death of the author or 42 years after October 19th, 1868, whichever may be the later date (fols. 135-136).

Fechter died in 1879 (fol. 122). Seven years after his death, would be 1886. Forty-two years after the performing copyright was secured, would be 1910. Hence, the English performing copyright expired in 1910.

The defendant contends that on the expiration of the statutory performing right, that right became public property throughout the world. When the owner acquired the statutory right, it was upon condition, amounting to a binding promise on his part, that he should give the performing right to the public at the end of the statutory term. That implied promise was not limited to Great Britain, it was an agreement to abandon the right throughout the world at the end of the term. While the British legislature could not provide what legal effect the acquisition of the British statutory copyright should have outside the British dominions, it could exact as a condition of its grant of the statutory right an agreement to abandon the right throughout the world at the end of the statutory term.

The case of *Frohman vs. Ferris*, 223 U. S., 424, dealt with a different situation. The play which was the subject matter of that action was first performed in London in 1894, and the statutory performing right acquired in England had not expired when the infringing play was produced in the United States. The question involved was whether the securing of the statutory performing right in England was an abandonment of all the owner's common law rights abroad. The Court held that it was not. But that decision cannot control the situation that exists with regard to the

London Fechter version of *Monte Cristo*, the statutory performing right in which has expired.

It is a principle which has been recognized by the international copyright conventions that after a statutory right has expired in the country where the work originated, it is entitled to no further protection in any other country. (Article 2, §2 of Berne Convention; Article 7 of Berlin Convention.)

It seems illogical to hold that one who has agreed at the time when his right was given to him that it shall be dedicated to the people of the world after he has enjoyed the monopoly for 42 years, may still find that monopoly in unlimited effect in the United States.

If the performing right in the London version has become public property, the plaintiff cannot claim private property in it by adverse possession.

POINT III.

Adverse possession furnishing no basis for plaintiff's exclusive ownership of the Fechter version, plaintiff's title to the exclusive performing rights in the play has not been established.

(1) The plaintiff's version was made by Fechter, assisted by LeClereq.

Fechter and LeClereq were employed by Arthur Cheney, owner of the Globe Theatre, in Boston; Fechter as director and leading actor. It is claimed by plaintiff that the play passed to Cheney because it was made by Fechter and LeClereq in the course of their employment.

There is no evidence that this Boston version was written by Fechter and LeClerc.

But if it was written by them it would be their property. The mere fact that they were employed by Cheney when they wrote this version does not show that it became the property of Cheney.

It has been held that a work composed by an employee of a theatrical manager does not, in the absence of an express agreement to that effect, become the property of the manager.

In *Shepherd vs. Conquest*, 17 Common Bench Reports, 427, pages 441-445, the proprietors of a theatre employed an author to compose for them a dramatic piece paying him a weekly salary and travelling expenses.

The defendant pirated this dramatic piece and the proprietors of the theatre commenced an action to recover damages for the piracy. *Jarvis, C. J.*, said:

"We do not think it necessary in the present case to express any opinion whether, under any circumstances, the copyright in a literary work, or the right of representation, can become vested ab initio in an employer other than the person who has actually composed or adapted the literary work. It is enough to say, in the present case, that no such effect can be produced where the employer merely suggests the subject, and has no share in the design or execution of the work, the whole of which, so far as any character of originality belongs to it, flows from the mind of the person employed. It appears to us an abuse of terms to say, that, in such a case, the employer is the author of a work to which his mind has not contributed an idea; and it is upon the author in the first instance that the

right is conferred by the statute which creates it.

We cannot bring our minds to any other conclusion than that Courtney, the person who actually made the adaptation, though at the suggestion of the plaintiffs, acquired for himself, as the author of the adaptation, and, so far as that adaptation gives any new character to the work, the statutory right of representing it; and that, inasmuch as the plaintiffs have no assignment in writing of that right, they cannot sue for an infringement of it" (pages 444-445).

In *Boucicault vs. Fox*, 5 Blatchford, 87, Dion Boucicault, the well known actor and dramatist, made an arrangement with Mr. Stuart, then the lessee of the Winter Garden Theatre in the City of New York, by which he became the stage manager and general director of the theatre. Under that arrangement Boucicault was to write the play "The Quadroon," and he and his wife were to perform in it as long as it would run at the Winter Garden. Boucicault and his wife performed in the play for a short time and then they withdrew from the theatre and its performances.

Stuart continued the performances of the play for several weeks, although the plaintiff's connection with the theatre had ceased. While the play was being performed Stuart sold all his rights in the manuscript and its representation to the defendant. The plaintiff commenced an action to restrain the defendant from producing the play.

The defendant pleaded as a defense that the writing of the play for hire and compensation paid to the plaintiff and its delivery to Stuart gave not only the title to the play, but a right to its use, as a literary composition to Stuart.

Judge Shipman, in discussing this question, says on page 95:

"Was the literary property in the composition, and the exclusive right to its representation, in the plaintiff? The questions, under this head, relate to the bearing, on the plaintiff's title, of the fact, that he wrote the drama while in the employ of Stuart and for hire, and also to the proof of his copyright. It is proper here to revert to the agreement under which this play was produced by the author. That agreement was, that he should write this play and, perhaps, some other plays, and that he should contribute his and his wife's services at the Winter Garden theatre, as long as the plays would run there, and receive half the profits, as a compensation. This cannot be construed into a contract conferring upon Stuart, or anyone else, the legal or equitable title to this drama. The title to literary property is in the author whose intellect has given birth to the thoughts and wrought them into the composition, unless he has transferred that title, by contract, to another. In the present case, no such contract is proved. The most that could possibly be said, in regard to the right of Stuart, or his trustee, in the play, is, that the arrangement entitled them to have it performed at the Winter Garden as long as it would run. There is not the slightest foundation upon which they, or either of them, can rest a claim to the literary property in the manuscript. That property was in the plaintiff, subject, at most, to a license or privilege, in favor of Stuart and Fields, to have the piece performed at the Winter Gar-

den. Whether the plaintiff was guilty of a breach of that part of his agreement which bound him to bestow his own and his wife's services, we need not enquire here. Such a breach, if proved, would not vest the proprietors of the theatre with the title to 'The Octoroon.' A man's intellectual productions are peculiarly his own, and, although they may have been brought forth by the author while in the general employment of another, yet he will not be deemed to have parted with his right and transferred it to his employer, unless a valid agreement to that effect is adduced. Publishers, when they employ authors in particular literary enterprises, of course settle, in the terms of their contracts, the rights of each party and the ownership of the copyright. This was not the case of writing a book for publication and general circulation. The play was to be produced, so far as Stuart and Fields were concerned, for a special purpose, and their rights are co-extensive only with that special purpose, which was, that the play should be brought out by the plaintiff at the Winter Garden, and he performed as long as it would run. The contract cannot, by the most liberal construction, be expanded beyond this."

See Drone on Copyright, page 86.

There is no evidence of any agreement transferring the Boston version from Fechter and LeClercq to Cheney.

There is no evidence that Cheney ever owned the *exclusive performing rights in the play*. *The Court has so found* (fol. 148).

(2) There is no evidence that Stetson acquired the exclusive performing rights from Cheney.

As no title to such exclusive right has been shown in Cheney, no transfer to Stetson would vest exclusive rights in Stetson.

The manuscript which Stetson had in his possession was made after the alleged transfer from Cheney to Stetson (fol. 146).

As the manuscript was made for Stetson, the statement on the title page: "Now the property of Mr. John Stetson" is a self-serving declaration and not evidence.

Plaintiff's Exhibit F, consisting of paragraph 6 of the complaint in the action by John Stetson against James B. Studley (page 198), was improperly admitted in evidence. Proper objection was made to its admission (fols. 320-322).

This complaint was filed ex parte; there was no trial and no judgment.

It was inadmissible for the following reasons:

(a) That the complaint was not an "official record" coming within Section 955 of the Code.

By official record is meant a judgment roll which embodies in itself the issue of the controversy as adjudicated by the Court and supersedes the conflicting mass of pleadings, allegations and proofs.

Wigmore on Evidence, page 3456.

In construing this Section of the Code, the Appellate Division of this Department in *Lalor vs. Tooker*, 130 A. D., at page 15, stated:

"The instruments offered in evidence were executed, verified and received by the Surrogate for the purpose of giving the Surrogate's Court of the City and County of New York

jurisdiction over the estate of the decedent. They were acted on by the Surrogate and based upon the statements therein contained the estate of the decedent was administered and distributed under the laws of this State."

The section must be restricted to such records as embody the official action of the Court.

If all papers filed in an action were to be deemed presumptive evidence, though not the subject of any action by the Court, the defendant's answer denying the allegations of the complaint would likewise be presumptive evidence of the denials.

(b) The allegation of the Stetson complaint is a self-serving declaration and partly a hearsay statement.

This Court has held that documents that by their nature are not competent evidence are not made competent by Section 955 of the Code.

In *Robinson vs. Supreme Commandery*, 77 A. D. 220, the Court said:

"The main purpose seems to have been to remove the difficulty of proving the accuracy of old maps, surveys and official records which have been on file and accepted as correct for more than twenty years in the transaction of official business. It must be presumed that the members of the Legislature at the time of the enactment of this new provision in this section were aware of the decisions of the courts against the admissibility in evidence in actions between private parties of death certificates filed pursuant to local laws. If the legislature had intended to change this rule of evidence, we think it would have prescribed that

such certificates would be admissible from official files in any county; and if on the theory that there were special reasons justifying it, which are not apparent to us, it had been intended to make them admissible in the County of New York only, definite appropriate language to that end would have been employed. The certificate was, therefore, properly excluded."

(3). There is no evidence that the Fechter version was never published by Fechter, Cheney and Stetson.

It is part of the plaintiff's case to show that his play was never published.

In *Bosselman vs. Richardson*, 174 F., 622, the Court held that the owner of a copyright is bound to prove that neither he nor his assignor had published the work before copyright.

The rule applies to one who relies on his common-law property. As the right to copyright is lost by publication, so are the common-law rights.

POINT IV.

The features of the defendant's pictures complained of as infringements of plaintiff's play are public property, being contained in the novel, dramatic versions thereof, and in pictorial illustrations that are in the public domain.

The public sources which contain all the features of the defendant's pictures are:

1. The novel, *Monte Cristo*, published in the year 1844.

2. The dramatization made by Dumas.

3. The French-Lacey version published in England prior to 1868.

4. The Fechter London version.

5. The posters and pictorial illustrations of the Fechter Boston version, widely published in the United States by the plaintiff.

There is no dispute as to the fact that the novel, the Dumas dramatization and the French-Lacey version, are in the public domain.

One ground upon which the defendant claims that performing rights of the London Fechter version have become public property has already been stated, namely, that a statutory performing right in said version was secured and that the term of said statutory right has expired.

The evidence further showed that on October 17th, 1868, the London Fechter version was deposited in a public office, to wit: the office of the Lord Chamberlain in London, in pursuance of the act 6 & 7 Vic., c. 68 (fols. 716-718).

The filing of the play in this public office was a publication.

The representative of the Lord Chamberlain, whose deposition was taken, stated that the copy filed was printed in the form of a book (fol. 386).

See

Wright vs. Eisle, 86 App. Div., 356-358.

In that case it was held that the filing of plans with the Building Department as a preliminary to securing the consent of that Department for the

construction of a building is a sufficient publication to defeat the common law rights of property.

The Court, on page 358, says:

"The act of publication is the act of the author (*Jewelers' Mer. Agency vs. Jewelers' Pub. Co.*, supra, 251), and when the latter has permitted the work to be filed in a public office as a step in furnishing the basis on which he is to receive compensation from his work we are of opinion that, under the authorities cited above, the plaintiff has published his work to the world and can have no exclusive right in the design or in its reproduction."

The Trial Court held that the copy filed in the Lord Chamberlain's office was not made accessible to the public, because "no one has a right to make a copy of the play, as has been testified to by the representative of the Lord Chamberlain" (fol. 930).

The Court misconceived the testimony of the Lord Chamberlain's office.

He was asked in the eleventh cross-interrogatory:

"Has a stranger, without the permission of the applicant for a license or licensee, a right to remove or use plays submitted to the Lord Chamberlain, for his censorship?"

Answer:

"No, certainly not" (fol. 407).

This statement does not say more than that the particular copy filed could not be removed and used.

It does not mean that it cannot be examined like other public records.

The manner in which defendant's counsel obtained a copy of this play, indicates that copies of the plays on file may be obtained.

The witness testifies:

"The request was made by Messrs. Strong, Buckmaster & Bolden, solicitors, on the 15th of March, 1913, and we sent them the copy on the 26th" (fol. 399).

It should be noted that when this request was made the performing copyright had expired. At that time, anyone had the right to use a copy of the play for the purpose of performance.

The defendant offered in evidence a number of newspaper reviews giving a full description of the London Fechter version as performed in the Adelphi Theatre in October, 1868 (pages 209-238).

These reviews were parts of newspapers deposited in the British Museum pursuant to the English Copyright Act, 5 & 6 Vict., c. 45, paragraph VI (fol. 731). The newspapers containing these reviews have been kept in the British Museum since 1870 or 1871, and have ever since been accessible to the public (fols. 423, 425).

It is not necessary to show that these descriptions of the play could have been used for the purpose of performing a similar play during the life of the performing right.

But since 1910, when that right expired, anyone could use those reviews and reproduce the characters, scenes and incidents of the play as described in said reviews.

The posters and pictorial illustrations published by the plaintiff and his assignor, depicted many

of the important scenes and incidents of plaintiff's play (fols. 123-125).

The Court held that these pictures are not a publication of the scenes depicted. But they are a representation of these scenes in the same manner as the defendant's pictures, namely by means of photographs.

It has been held in *Edison vs. Lubin*, 122 Fed., pages 240, 242, that a motion picture is a photograph—a picture produced by photographic process.

The Court found that for the purpose of making these posters and prints, photographs of the scenes and incidents of the play were taken and from these photographs the posters and prints were reproduced (fol. 124).

There can be no claim that these posters and prints were not made public property.

The Court found that they were printed, published and widely circulated and displayed on bill boards and other public places in various parts of the United States (fol. 123).

In *Oertel vs. Jacoby*, 44 How. Pr., 179, it was held that where an author voluntarily published pictures to the public, for which he claims proprietary right anyone of the public may reproduce the pictures.

To the same effect see:

Caliga vs. Inter Ocean Newspaper Co.,
157 Fed., 186, 188.

Bamforth vs. Douglass Post Card & Machine Co., 158 Fed., 355.

Pierce vs. Werckmeister, 72 Fed., 54, 58.

Werckmeister vs. Am. Pic. Co., 117 Fed.,
330.

The defendant offered in evidence a series of flashlight photographs from which the posters were made, as follows:

Exhibit 17, showing the Interior of the Pont Du Gard, Dantes pointing his finger upwards in the same attitude in which he says "One!"; Villefort at his feet dead; LaCarconte lying against the banister; Caderousse crouching against the table in front of the fireplace; Noirtier on the side and Brigadiers in the rear.

Exhibit 16, depicting the reception to Monte Cristo.

Exhibit 15, Mercedes offering grapes to Dantes in the conservatory and Dantes' refusal to accept the same.

Exhibit 14, depicting the scene where Dantes seizes Albert's wrist, Albert resting one knee on the ground, Mercedes at his side, with Fernando to the left.

Exhibit 13, the woods at Vincennes, showing the duel between Danglars and Monte Cristo, and Noirtier at the side.

Exhibit 12, the reconciliation between Mercedes and Dantes. Dantes embracing Mercedes, Albert on his knees, Danglars dead and Noirtier some distance away.

Pictorial posters were also offered showing Dantes on the rocks with arms outstretched, holding a dirk in one hand, with the Chateau d'If in the distance. Underneath the rocks the imprint "The World is Mine." Another scene, showing the duel between Danglars and Dantes with the imprint "The Last One, Three!"

Another, showing two scenes in the Inn, first, Noirtier disguised as a peddler bargaining with Caderousse and LaCarconte about a diamond, bearing the imprint "Worth 50,000 Francs at least."

Another showing the Inn with Villefort dead and Dantes in the post saying "One!" LaCarconte dead with head extending through a broken

banister, with the imprint "Dantes, Vengeance One."

Another scene showing Noirtier and Villefort with the imprint "Noirtier & Villefort Brothers."

The record contains a table (Defendant's Exhibit 26), showing in which of the public sources the characters, scenes and incidents depicted in the defendant's pictures may be found (pages 280-300).

POINT V.

The judgment appealed from should be reversed and the complaint dismissed.

NATHAN BURKAN
of Counsel for Defendant.

Argued by
DAVID GERBER.

Supreme Court—Appellate Division

FIRST DEPARTMENT.

JAMES O'NEIL,
Respondent,

against

GENERAL FILM COMPANY,
Appellant.

RESPONDENT'S BRIEF.

Statement.

The case comes before the court on an appeal by the defendant from an interlocutory judgment, entered after trial at Special Term, before Mr. Justice Shearn, directing an injunction to issue, restraining the defendant from giving motion picture exhibitions of what is known as the "Fechter version" of "The Count of Monte Cristo," owned by the plaintiff (see decree, fols. 71, 80).

This is the second time the defendant has brought the case before this court. The former appeal of the defendant was from an order granting the injunction pendente lite, which was affirmed, but, of course, without concluding the trial court (155 A. D., 887).

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After a two days' trial before Justice Shearn (fols. 180, 377), he made the temporary injunction permanent, filing an opinion which concisely states the facts, and with great lucidity declares the law applicable to the facts (see opinion, fols. 904, 936).

In 1844, Alexander Dumas wrote his famous novel "The Count of Monte Cristo." The English translation shows the book to consist of two volumes, each of over 600 closely printed pages, *with no less than seventy characters* and innumerable interesting scenes and incidents (fol. 85).

Charles Fechter was an actor, employed at the Globe Theatre in Boston, and he, with Arthur Leclercq, undertook to dramatize these two volumes for production upon the stage. The importance of this dramatization consisted in getting a production which could be interestingly produced within the limits of an evening's performance—between two and one-half or three hours (fols. 86-87).

Dumas himself had written a dramatization in which he followed his book, and the result was that it consisted of four parts, *each part requiring one night for its performance*. It was only played a few nights, the first and second parts in 1848, and the third and fourth parts in 1851. (Plaintiff's Ex. D, p. 198; Defendant's Ex. 6, fol. 623.)

It, therefore, was clear that a dramatization that followed the book was impossible (see Dumas' French dramatization of his book, Defendant's Ex. 6, fol. 623).

Fechter and Leclercq undertook what Dumas had failed in accomplishing, namely, extract and condense from the voluminous novel (consisting of two volumes), such of the scenes and char-

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acters as would tell an interesting story, connectedly, within the limits of an evening's performance. *This required the dropping of not less than forty-three characters and innumerable incidents and scenes found in the book*. It also required changing certain of the characters, placing them in different scenes, reconstructing, coloring and changing incidents so as to make the production complete, and not ragged or disjointed (fols. 87, 183).

The play was produced with great success at the Globe Theatre in Boston, of which Arthur Cheney was the proprietor and manager (fols. 88-89, 182-183). Fechter and Leclercq adapted the novel for Cheney, and it became known, not only throughout the profession, but with the theatre-going public, as the "Fechter" version (fols. 88-89-90).

John Stetson purchased from Cheney the Globe Theatre in 1877, together with "Monte Cristo" (fols. 89-93). James O'Neil played the leading character of Edmund Dantes in 1883 and made such a success of the part, that he purchased the play in 1884—*thirty years ago—and has been performing it ever since, off and on, having played the part of Edmund Dantes over five thousand times* (fols. 182, 214, 92).

The play was retained in manuscript form, and has never been published (fol. 88).

In the seventies and eighties, play pirates were more numerous than at present, and they generally gave their piratical performances in the far west, where it was difficult to reach a Federal Judge in time to secure an injunction and serve it before the pirate left the circuit, for which reason plays were not copyrighted at that time, but retained in manuscript form, because of the complete protection by state courts under the

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common law as laid down in the leading case of *Palmer v. DeWitt*, 47 N. Y., 532.

During the thirty years of plaintiff's ownership of the play he has successfully protected his property in the courts whenever a play pirate undertook to violate his rights (see fol. 93). The courts invariably upheld him in every litigation. The learned trial judge, in his opinion, says:

"The right and title to the play of the plaintiff has never been questioned and royalties have been received by and paid to the plaintiff from others who have sought and acquired from him a license to give performances, which royalties have continued down to and since the commencement of this action. The plaintiff has enforced, by suits, his right and claim against persons who undertook to give a performance of the play without his consent or license, and the courts have upheld, protected and recognized his right and title to the play, which has been a great artistic and financial success, and is of great value to the plaintiff" (fols. 912-913; see also fols. 92, 93, 94, 95).

Defendant is engaged in the business of furnishing films of photo-plays to managers and proprietors of motion picture theatres, to enable them to give public exhibitions of the photo-plays for compensation and profit (fol. 496). The infringing photo-play complained of was prepared by the Selig Polyscope Company, an Illinois corporation (fols. 99, 103), and over forty copies of this photo-play were distributed by the defendant among its different licensees, and caused to be produced upon the stage in various cities of the United States (fol. 103; see stipulation, fols. 546-551).

At the time the Selig Polyscope Company was preparing this photo-play, the law was somewhat unsettled in respect of the question whether a mo-

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tion picture exhibition of a play violated the dramatic rights of the owner of the play. Down to that time, it had been contended that a photo-play exhibition was not a dramatic performance, but an exhibition of pictures or photographs, and therefore not violative of the dramatic rights in the play. (*Edison v. Lubin*, 122 Fed., 241; *Am. Mutoscope Co. v. Edison*, 137 id., 262.) Thereafter, however, the Supreme Court of the United States, in the test case of *Harper & Brothers v. Kalem Co.* (affecting the play "Ben Hur," 222 U. S., 55) decided in 1911, against the contention of the motion picture manufacturers, so that when this suit was brought, after the decision in the Kalem case, the defendant had been stripped of its sole defense. It may therefore be said to be pardonable if counsel for defendant has striven so hard, but in vain, to find some defense. He has shown integrity and skill, which the learned trial court in its opinion declared was "worthy a better cause" (fol. 9-19).

The answer besides a general denial of the material allegations of the complaint (fols. 38, 43) sets up three affirmative defenses: (1) That the Fechter version was prepared from material in the public domain (fols. 44, 48); (2) That for the purpose of advertising public performances of plaintiff's play, there was displayed in show windows and on billboards, theatrical posters, depicting the important scenes and incidents claimed by the plaintiff, which constituted a publication, without copyright protection (fols. 48, 54); and (3) That the photo-play exhibition by the defendant was prepared from translations, dramatizations and versions, posters, and prints, which were common property (fols. 55, 58).

As the proof developed at the trial, and after

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the court had seen defendant's photo-play (fol. 294), it became difficult for counsel to seriously urge any of his defenses, so that we find in his brief on this appeal that he has practically abandoned his answer and defenses, and now principally relies upon "newly discovered" technical objections to the decree.

POINTS.

I.

The contention that the copyrighting by the Famous Players Film Company of its motion picture did, in some way not clearly stated in the brief, oust this court of jurisdiction, is the purest afterthought, and obviously frivolous.

(a) The evidence relating to the copyright by the Famous Players Film Co. was objected to by us and admitted over our objection and exception (fols. 245, 246, 247), and only after all the evidence was in and both sides had rested, did the defendant move to amend its answer by alleging that this court was ousted of jurisdiction by the act of the Famous Players Company (fols. 538, 539).

The plaintiff's play is and always has remained in manuscript form, and has at no time been published or dedicated to the public (finding, fol. 88; see manuscript in evidence, Plaintiff's Exhibit 544; see testimony, fols. 190, 193, 204).

As early as August 17, 1912,—three months before this action was commenced—defendant was notified by letter that its photo-play was an in-

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fringement of plaintiff's manuscript play (see letter, Exhibit A, fol. 553; Exhibit B, fol. 556; stipulation of facts, fol. 552). Notwithstanding this warning, the defendant hastily, and to anticipate an injunction, scattered over the United States, *forty sets of films of its photo-play* for exhibition in the various motion picture theatres throughout the United States (fol. 551; see finding of fact, fol. 104), and intended "to continue distributing said films for motion picture exhibitions, until restrained by an order of this Court" (see stipulation of facts, fol. 551).

This action was brought November 18, 1912 (fols. 2, 8).

The Famous Players Film Company, intending to make a motion picture of the story "Count of Monte Cristo," and finding it essential to use some of the material found in the plaintiff's play and original with Fechter, did what any honest exhibitor would do, and what the defendant should have done, secured plaintiff's consent for an agreed consideration or royalty.

The picture of the Famous Players Film Company was completed and first published December 10, 1912. *This was about three months after this action was brought.* The Film Company deposited copies of the film with the Librarian of Congress, at Washington, December 18, 1912 (fol. 600).

The picture was not exhibited until after the injunction order was granted, in the case at bar (fol. 228). Now, the defendant argues that *the act of the Famous Players*, in protecting its picture against infringers, has ousted this court of jurisdiction. It is not made very clear in the appellant's brief how *the act of the Famous Players Company, after the issuing of the injunction in this action*, has affected the plaintiff's right and

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deprived this court of its jurisdiction. It is not claimed that plaintiff did anything to oust the court of jurisdiction, it is not urged that plaintiff copyrighted any picture or required or directed the Famous Players to secure a copy-right. It is not questioned that this action was properly brought and could only be properly brought by the plaintiff in the state court, to protect a manuscript play (*Palmer v. DeWitt*, 47 N. Y., 532). No act of the defendant, after the injunction pendente lite, is complained of, nor is it claimed that the PLAINTIFF did any act which would oust this court of jurisdiction.

Counsel, in his brief, does not make it clear what tribunal would have jurisdiction, if not this court. He says the plaintiff must be thrown out of court, because of some act of the Famous Players Film Company, in copyrighting its film after this suit was brought. Of course, the plaintiff, resting upon a manuscript play, could not sue in the Federal court, and the Famous Players could not sue because the defendant did no overt act after the injunction was issued in this case, and the Famous Players Company gave no exhibition of its picture until after the injunction, so that, the contention of the appellant is that no one has any remedy and no court jurisdiction, although the defendant has been caught redhanded stealing plaintiff's literary property. (See opinion of learned trial justice).

(b) The Famous Players picture is an original production by Edwin S. Porter and Joseph Golden (see application for copyright, defendant's exhibit 3, page 201 of record). In making the picture, resort was had only to some portions of plaintiff's play. Porter was asked by defendant, on cross-examination:

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"Q. When you took the picture of Mr. O'Neill and his company, you made a substantially accurate reproduction of his play, did you not, of 'Monte Cristo'? A. No, I claim it is far from being an accurate reproduction (fol. 366).

Q. And when you made the 'Monte Cristo' in which Mr. O'Neill and this company appeared, you sacrificed spectacular effects, and simply reproduced everything that appeared in this play? A. Oh, no, we did not.

Q. Why did you make the sacrifice you speak of in this particular instance? A. We picked out what we thought the most effective scenes and situations in Mr. O'Neill's play.

Q. And you were willing to sacrifice some parts? A. Yes, sir, sacrifice some parts. I admit that.

Q. So that your rule does not apply? A. I did not say we sacrificed them. We just eliminated them, probably thought another situation would be better for our purpose" (fol. 362).

If the Famous Players Film Company had not secured plaintiff's consent to the use of such portions of his play as were deemed beneficial and of advantage to the picture, the Film Company would itself have been guilty of infringement. That company, to protect its creation against literary poachers, copyrighted the picture. This is permissible under the Copyright Act of 1909 (as amended August 24, 1912), which expressly provides for the copyrighting of a motion picture photo-play, entirely distinct and apart from the novel, book or dramatization, and without affecting the right possessed or obtained by the owner of the book, novel or dramatization.

"Under the Copyright Act, as amended in 1912, the rights to dramatize a novel in the usual form and in the form of a motion pic-

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ture play are separable, and there may be a copyright for each dramatization" (syllabus).

Photo-Drama Motion Picture Co. v. Social Uplift Film Corporation, 220 Fed., 448.

In *Aaronson v. Fleckenstein*, 28 Fed. 75, a litigation concerning the well-known operetta "Erminie," in which the pirate contended that the publication of songs and the vocal score of the operetta justified his wrongful performances. The court held:

"An original operetta, consisting of libretto, score and name, is property at common law, which, so far as unpublished, will be protected from fraudulent imitation by injunction. * *

Publication of the songs and vocal score of an operetta, with the name of the operetta, does not make such name public property" (syllabus).

What defendant used was plaintiff's play—not the Film Company's picture exhibited *after* the injunction in this case (fol. 228).

(c) It is suggested by counsel that a second suit might lie on behalf of the Famous Players Film Company, which would open defendant to a double liability.

The defendant did not use and could not have resorted to any part of the Famous Players film, which was not published until December 10, 1912, and no copy filed with the Librarian of Congress until December 18, 1912, while this action was brought and an injunction applied for November 18, 1912. It is therefore obvious that no action would lie by the Famous Players against the defendant; but even if such a suit could have been brought it would be no answer to this action, so

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far as the infringement affects plaintiff's manuscript play.

In *German American Coffee Co. v. Diehl*, 216 N. Y., page 57, which was an action brought by a corporation against directors, for payment of dividends out of capital, and not surplus profits, the objection was made that a suit might also be brought by the stockholders. The court, answering this objection, said (page 66):

"That New Jersey gives the right of action in like circumstances to the stockholders, is not equivalent to a denial to the corporation of capacity to enforce a like right of action in the courts of another forum. There is no risk that the directors will be made to pay the same damages twice. Whatever is paid under a judgment in this action, will mitigate to an equivalent extent the damages recoverable in another action by the stockholders."

(d) Most of the German and French plays produced in this country are kept in manuscript form and are not printed for copyright purposes. Under the English statute, prior to the Imperial Act of 1911, a performance upon the stage was deemed a publication, so that a stage representation was generally given for copyright protection; but, since 1911, the English statute has adopted the American decisions, that a stage representation is not a publication of the play (Act of 1911, section 1, subdivision 3). Therefore, the German, French and English plays are, as a general rule, kept in manuscript form, there being no great demand by the reading public for plays, calling for the printing or multiplication of copies for sale. If, therefore, counsel's afterthought is well taken, the proprietors of every German, French and English manuscript play which has, to

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any extent, been used in connection with a motion picture—and a vast number of these have been used for that purpose—have lost all protection. They cannot sue in the state court, counsel argues, because of the copyrighting of the motion picture by the film manufacturer, and they cannot sue in the federal court, because they have no copyright.

II.

The plaintiff's title has never been questioned in the thirty years that he has owned the play, and during that time, he has performed the character of Monte Cristo for over five thousand times, and has been successful in stopping every infringer.

The facts found by the court are:

- “5. That the said dramatization known as the Fechter version was the only dramatization of the said book or story ‘Count of Monte Cristo’ which has ever been performed with success.
6. That the said Fechter version of ‘Count of Monte Cristo’ and entitled ‘Count of Monte Cristo’ was kept in manuscript form, and has never, at any time, been published or dedicated to the public.
7. That in and prior to the year 1883, one John Stetson was the owner of a theatre in the City of Boston, known as the Globe Theatre, where the said Charles Fechter had, prior to his death, been employed as the leading actor.
8. That in said year, the plaintiff, James

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O'Neill, was employed as an actor by the said John Stetson, and played the principal character in the said Fechter version of the said play ‘Count of Monte Cristo,’ being the character of Edmund Dantes, later known in the play as the Count of Monte Cristo.

9. That in the said year of 1883, the said John Stetson owned the said Fechter version of the said play, and the manuscript thereof, and was in possession of the original manuscript.

10. That subsequently and in June, 1885, the plaintiff purchased, for a valuable consideration, from the said John Stetson, the said play of ‘Count of Monte Cristo,’ known, as aforesaid, as the Fechter version, and the said John Stetson delivered to the plaintiff the original manuscript of the said play, which manuscript has ever since been, and is now, in the possession of the plaintiff.

11. That at the time of the purchase of the said play by the plaintiff from the said Stetson, there was delivered to the plaintiff in addition to the said original manuscript, a bill of sale or transfer of the title of the said play and manuscript from the said John Stetson to the plaintiff.

12. That since June, 1885, the plaintiff has been in the continuous, uninterrupted, open possession of the said play, and the manuscript thereof, and has performed upon the stage in the various cities of the United States the said play, namely, what is known as the Fechter version of ‘Count of Monte Cristo’ for no less than 5,000 times, acting the principal character of Edmund Dantes, or the Count of Monte Cristo, in the said play, and appearing in the various states of the United States.

13. That the plaintiff has become identified with the said play because of his continuous production of the play since 1885, and has made the play famous, and the said play has been the principal and almost sole dramatic

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production in which the plaintiff has appeared since 1885.

14. That the right and title of the plaintiff in and to said play has never been questioned since he acquired the said play in 1885, and royalties have been received by and paid to the plaintiff from others who sought and acquired from him a license to give performances thereof, which royalties have continued down to and after the commencement of this action.

15. That the plaintiff has enforced, by suits, his right and claim against persons who undertook to give a performance of the said play without his consent or license, and the Courts have upheld, protected and recognized the plaintiff's right and title to the said play

16. That the plaintiff's possession of, and title to, the said play has been open, notorious and continuous, without question or dispute since he acquired the said play in June, 1885."

(Findings 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, at fols. 87-94.)

The learned trial justice, in his opinion, says:

"This dramatization (referring to the Fechter version) is the only one of the novel which has been performed with success. The Fechter version was kept in manuscript form, and has never, at any time, been printed and published or dedicated to the public. Fechter gave public performances of the drama from his version from 1873 to the time of his death in 1879. Some of the performances were at the Globe Theatre, Boston, which was owned by one Cheney. John Stetson succeeded Cheney as the proprietor of the Globe Theatre, and came into possession, from Cheney, of the Fechter manuscript. Stetson was in possession of the manuscript in 1883 and produced the play with great success, the plaintiff herein being the leading actor, and play-

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ing the part of Edmond Dantes, known in the latter part of the play as the Count of Monte Cristo.

In June, 1885, the plaintiff purchased, for \$2,000.00, from Stetson the Fechter version of the play and Stetson delivered to the plaintiff the manuscript, which has ever since been in the possession of the plaintiff. At the time of the purchase of the play, Stetson delivered to the plaintiff, with the manuscript, a bill of sale or transfer of the title of the play and manuscript from Stetson to the plaintiff. Ever since 1885 plaintiff has been in the continuous, uninterrupted, open possession of the play, and the manuscript thereof, and has performed upon the stage in the various cities of the United States the play known as the Fechter version more than 5,000 times, by reason of which the plaintiff has become identified with the play, and has made it famous, the play being the principal and almost the only dramatic production in which the plaintiff has appeared since 1885. The right and title to the play of the plaintiff has never been questioned and royalties have been received by and paid to the plaintiff from others who have sought and acquired from him a license to give performances, which royalties have continued down to and since the commencement of this action. The plaintiff has enforced, by suits, his right and claim against persons who undertook to give a performance of the play without his consent or license, and the Courts have upheld, protected and recognized his right and title to the play which has been a great artistic and financial success, and is of great value to the plaintiff" (fols. 909-913).

We find scattered throughout the appellant's brief the statement that there are "two dramatic versions of the Dumas novel, 'Monte Cristo,' both of which were known as the Fechter version" (appellant's brief, p. 21). Counsel states:

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"The earlier Fechter version was made in London for the manager of the Adelphi Theatre, Benjamin Webster, and a printed copy of that version was deposited by Webster in the Lord Chamberlain's Office on October 17, 1868 (fols. 133, 134; appellant's brief, page 21).

These statements are not based on the record, and they appear in several parts of the brief (see also pages 6, 7, 22, 24 and 25). *The fact is there was only one Fechter version of "Monte Cristo" and that the one owned by the plaintiff.* It is true that Benjamin Webster did give a performance in London of "Monte Cristo," but it was a performance of the Fechter version owned by the plaintiff.

Fechter wrote the character of "Noirtier" in his version of "Monte Cristo" for Benjamin Webster. Noirtier, in the novel, is the father of deVillefort, and a paralytic unable to leave his room, and plays a very unimportant part in the book. In the Fechter version, Noirtier is the half brother of deVillefort, playing a part second only to Edmund Dantes, who afterward becomes the Count of Monte Cristo, and is found in every important scene throughout the play.

This character of Noirtier was written by Charles Fechter because of the unique abilities of Benjamin Webster, and in order to have him play the part of Noirtier. The record respecting this is as follows:

(Direct Examination of James O'Neil.)

"Q. Now tell me if you know what principal characters that a man named Benjamin Webster played in?

Mr. Burkan: I object as incompetent immaterial and irrelevant.

Objection overruled and exception.

A. Benjamin Webster became famous in four different plays. One was Robert Beau-

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caire, the other was Oliver Twist, in which he played Fagin; the other was the Dead Heart, in which he played the principal role of Village.

Q. What was the fourth? A. Then Don Caesar de Bazan. He made a great reputation in all those parts in London.

Q. And he played the role of Noirtier in the Fechter version, that Fechter wrote of the Count of Monte Cristo? A. *It was written for Benjamin Webster.*

Q. You are familiar of course with these different characters, of the four plays you have mentioned? A. I have played nearly all of them myself.

Q. And of course you are familiar with the character of Noirtier in the Count of Monte Cristo? A. Very well.

Q. Does the character of Noirtier in the Fechter version embody the characteristics of the four parts that you have mentioned in those four plays that Webster played in? A. There is a scene representing each one of those plays, taken from those plays, put into the character of Noirtier in Mr. Charles Fechter's play" (fols. 184-186).

When Webster played the Fechter version of "Monte Cristo" in London, he deposited a copy with the Lord Chamberlain, as required by the English statute, under which all plays are censored before they can be produced (6 & 7 Vic. Chap., 68). Under this statute the manager of the theatre must deposit a copy of the play for purposes of censorship. *This filing is compulsory*, and no one has a right to make or take or even see a copy of the play, other than the Lord Chamberlain, or his representative (see deposition of Herbert Trendall, Chief Clerk, Lord Chamberlain's Office, fols. 404, 405, 406, 407; see also the statute, fols. 17, 719).

In those days as plaintiff testified, "instead of

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giving out written parts, they handed each of the company the characters and play like that (indicating) and that size" (fol. 530).

"Q. But the play was not published generally, was it? A. It was printed, but not published" (fol. 530).

The copy which was filed with the Lord Chamberlain (Deft. Ex. 20, fol. 716), if compared by the court with the manuscript play of the plaintiff, in evidence (p. 182, fol. 544) will be found to be the same with some slight unsubstantial changes (fol. 254). Notwithstanding this record, counsel persists in sprinkling throughout his brief the statement that there are two Fechter versions of this play.

Fechter was a French actor, who studied English and came to this country recommended by Charles Dickens as one of the greatest actors Dickens had ever seen, especially in romantic parts (fol. 183). Arthur Cheney was the proprietor of the Globe Theatre in Boston, and Fechter the stage manager and leading actor at the Globe Theatre, where the play "Monte Cristo" was produced. John Stetson purchased and acquired from Cheney the Globe Theatre, and among other plays, "Monte Cristo" (page 198, Plaintiff's Exhibit F).

As early as 1883, the plaintiff played under John Stetson's management in the play "Monte Cristo," at Booth's Theatre, in New York, and the following year at the Globe Theatre, Boston (fol. 182). In 1885, Stetson sold the play to plaintiff for \$2,000 (fols. 187, 188) and delivered to him the original manuscript, which has ever since been in plaintiff's possession (fols. 188, 189, 190, 191, 192 and 193), and also executed a bill of sale to him (fols. 194, 202; see also testimony of Charles W. Wilder, fols. 325, 327, 329).

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Since 1883, plaintiff performed the principal role in the play for over five thousand times (fol. 204), and was obliged to commence suits against infringers (fol. 207), but never consented to a performance by any person without the payment of royalties (fol. 208). The plaintiff has been in the open, unquestioned, undisturbed possession of the manuscript of the play for over thirty years, legally protecting his title against every adverse claim during that entire period. If we had nothing in the case but the possession of the manuscript, and the open claim of ownership by O'Neil for over thirty years, successfully maintained against all infringers and adverse claimants, it would be sufficient title *as against a pirate who makes no claim of ownership*.

In *Lightfoot v. Davis*, 198 N. Y., 261, the court said at page 265:

"We have in our state, however, no statute relating to the adverse possession of chattels or personal property, nor do I know of any in any other state. Nevertheless, it seems to be the generally accepted doctrine that by adverse possession title to chattels may be acquired which will be paramount to that of the true owner. Though there are no decisions in our courts on the question they are numerous in other jurisdictions. *Brent v. Chapman*, 5 Cranch., 358; *Layne v. Norris*, 16 Gratt. (Va.), 236; *Newby v. Blakey*, 3 Hen. & Mun. (Va.), 57; *Dagroo v. Cooper*, 72 Ky. (9 Bush.), 629; *Carr v. Barnett*, 21 Ill. App., 137; *Gaillard v. Hudson*, 81 Ga., 738; *Connor v. Hawkins*, 71 Tex., 582; *Chapin v. Freeland*, 142 Mass., 383). In *Campbell v. Holt* (115 U. S., 620) in discussing the power of the legislature to revive an outlawed debt by repeal of the Statute of Limitations, Judge Miller wrote: 'Possession has always been a means of acquiring title to property. It was the earliest

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mode recognized by mankind of the appropriation of anything tangible by one person to his own use, to the exclusion of others, and legislators and publicists have always acknowledged its efficacy in confirming or creating title. The English and American statutes of limitation have in many cases the same effect, and, if there is any conflict in the decisions upon the subject, the weight of authority is in favor of the proposition that, where one has had the peaceable, undisturbed, open possession of real or personal property, with an assertion of his ownership, for the period which, under the law, would bar an action for its recovery by the real owner, the former has acquired a good title—a title superior to that of the latter, whose neglect to avail himself of his legal rights has lost him his title. This doctrine has been repeatedly asserted in this court. (*Leffingwell v. Warren*, 2 Black., 509; *Croxall v. Shererd*, 5 Wall., 268, 289; *Dickerson v. Colgrove*, 100 U. S., 578, 583; *Bicknell v. Comstock*, 113 U. S., 149, 152.)”

Title in that case was held to be a bar to an action for the recovery of the chattel *by the real owner*. Here, a poacher, *who makes no claim of ownership*, attacks the title.

In *Monnot v. Murphy*, 207 N. Y., 240 (decided in January, 1913), the court said:

“In *Barnes v. Light* (116 N. Y., 34, 39), this court said: ‘The actual possession and improvement of the premises, as owners are accustomed to possess and improve their estates, without any payment of rent, or recognition of title in another, or disavowal of title in himself, will in the absence of all other evidence, be sufficient to raise a presumption of his entry and holding as absolute owner, and unless rebutted by other evidence, will establish the fact of a claim of title. Possession, accompanied by the

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usual acts of ownership, is presumed to be adverse until shown to be subservient to the title of another.’

In the case at bar the judgment under which the possession of the premises was taken from Husson and delivered to Monnot did not tend to show that the subsequent possession of Husson, accompanied by the acts usually attending ownership, was subservient to the title of Monnot or another * * *

The ultimate element in the rise of a title through adverse possession is the acquiescence of the real owner in the exercise of an obvious adverse or hostile ownership through the statutory period. The object of the statute defining the acts essential to constitute an adverse possession is that the real owner may, by unequivocal acts of the usurper, have notice of the hostile claim and be thereby called upon to assert his legal title. (*Trustees, etc., of Town of East Hampton v. Kirk*, 84 N. Y., 215). The judgment did not create any relation between Husson and Monnot or Husson and the premises which deprived those statutory acts, as and if performed by Husson and his successors, of their effectiveness as a notice to the holders of the real title that an adverse occupation existed. Husson, removed by virtue of and under it, was in no different standing or situation from that which would have been his if he had not possessed or claimed the lands prior to the removal. It established that Monnot's title was superior to that under which Husson was then claiming, but did not to any extent bar Husson from thereafter at any time claiming title, or prevent the entry and occupation thereunder from being adverse. To constitute them adverse the claim of title was not required to be valid” (pp. 244, 245).

In that case, the court went so far as to say that *an invalid title* is as effectual, as a con-

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stituent of the notice to the rightful owner that the occupation under it is in defiance of his title, as a valid claim; and that possession with acts of ownership, *raises a presumption of title.*

Property in a manuscript is not distinguishable from any other personal property. It is governed by the same rules of transfer and succession, and is protected by the same process, and has the benefits of all the remedies accorded to other property, so far as applicable.

Palmer v. DeWitt, 47 N. Y., 532;

Parton v. Prang, 3 Cliff., 550.

In this case, every one who ever had title to the property, from Stetson down, recognized the rights of O'Neil. His acts of ownership were complete and continuous for over thirty years.

The best evidence of title to a manuscript play is possession of the manuscript.

Palmer v. DeWitt (supra).

If Mr. O'Neil had possession of a coat for over thirty years, and it were possible to publicly wear the coat for that period of time, and there was no adverse claim made thereto during that period, surely the court would hold that he established his title, in an action for conversion against a wrongdoer.

We were fortunate in being able to furnish the proof we did, because ordinarily, in actions of this character, the proof at hand is the possession and production of the manuscript, which throws upon the defendant the burden of establishing that the possession was wrongful.

In this case, we were able to prove *the bill of sale*, showing the purchase; the delivery of the manuscript; possession of the manuscript for

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thirty years; *open, notorious and continuous possession* and giving of performances; claim of ownership during those thirty years by suits against infringers, all successfully maintained. Not only that, but declarations both under oath and not under oath, made by Stetson, while he was in possession of the manuscript, declaring the nature of his possession, to wit: absolute ownership. *As against that, there is not a word of proof.*

If more proof were required than we furnished in this case, no pirate could ever be prevented from performing a play, other than one of very recent date. How is it possible to furnish proof, going back beyond a period of thirty years?

If this suit involved real estate, and we were suing a trespasser, would not the court be satisfied with evidence of actual possession of the land openly, and in hostility to every other title, for a period of over twenty years? Indeed, as against a trespasser, *mere possession would be sufficient*, no matter how recently the possession was acquired.

“It is a general rule which is supported by decisions in nearly every jurisdiction that as against a mere tort-feasor, mere actual possession of land is alone sufficient to maintain trespass.”

38 *Cyc.*, p. 1017.

III.

We shall not waste much time discussing the point respecting the pictorial advertising.

It is the first time so ridiculous a doctrine was advanced in the law of literary property. No one would dream of advancing it, unless he was driven very hard, for a defence. If the contention were tenable, no play could be performed, without immediately surrendering it to the public the moment the important scenes were advertised pictorially.

This would apply to copyrighted as well as to manuscript plays, because copyright only protects the printing and vending of printed copies of the play, and embraces the exclusive right to perform. If, then, there should be pictorial advertising of the scenes of the play, it would constitute a dedication of the play to the public, under counsel's argument, because it was in a form not protected by the copyright of the book.

A dramatic composition is a work in which the narrative is told by dialogue or action, and the characters go through a series of events, which tell a connected story. It may be a pantomime, and the story told in action, but to make it a dramatic composition, it must tell a connected story or a series of events.

Daly v. Palmer, 6 Blatchford, 256;

Daly v. Webster, 56 Fed., 483.

If that dramatic representation is published, without statutory protection, the play becomes common property. A mere advertisement—a

mere pictorial inducement or invitation to witness a performance—does not tell the story of the play as the actors do. It is not the story told in action, and it is not the story told in print. Therefore, it is not a publication of the story.

The construction of “a publication,” under the Copyright Law, is the same as a publication of a manuscript play, and “the publication referred to in the statute” is an edition offered to the public for sale or circulation.

Falk v. Engraving Co., 4 C. C. A., 648;
54 Fed. Rep., 890.

IV.

The filing of the play by Webster with the Chamberlain in London, for purposes of censorship, was not a publication of the work.

The statute made it obligatory on every *manager of a theatre* (not owner of the play) to deposit a copy of *every play*, before a performance can be given, for purposes of censorship. No one has a right to make a copy of the play, as testified to by the representative of the Lord Chamberlain (fols. 404-405, 406-407) (6 and 7 Vict., Chap. 68, fols. 716):

“Such a delivery of copies of a literary production is not a publication, and could not prejudice the owner's common law rights.”

Bartlett v. Crittenden, 4 McLean, 300;
Press Publishing Co. v. Monroe, 73
Fed. Rep., 196 at p. 198.

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It would be an astounding proposition if a person *who is compelled*, under the law, to submit his play to censorship before production, thereby loses title to his play.

In *Jewelers' Mercantile Agency v. Jewelers' Publishing Company*, 155 N. Y., 241, referred to by counsel, the book of the plaintiff had been published and was delivered generally to subscribers and *anybody could subscribe and get a copy of the book*, which the court held constituted publication. After publication in that form, the common law right was gone.

V.

The declarations of John Stetson in his lifetime while in possession of the play characterizing his possession, are competent.

Beattie v. Gabel, 155 A. D., 786, 794.

VI.

The infringement of the plaintiff's play by defendant was not seriously contested below, after the learned Trial Judge had witnessed an exhibition of defendant's photo-play, and after the close of the cross-examination of the only witness called by the defendant (Pribyl) on the question of infringement.

In discussing this question of infringement, we do ample justice to the record if we quote from the opinion of the court below. The learned judge said:

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"Defendant resists plaintiff's claim of title, and claims that the motion picture play was produced by resort to original sources, alleged to be open to all, namely, the novel and the dramatic versions antedating the Fechter version, and that in so far as there is any similarity between the motion picture play and the Fechter version, it is lawful and proper in that the similar incidents and characters are found in the novel and similar versions.

The Court has examined the novel, the Dumas dramatization, the Webster (or first Fechter version), the French or Lacy versions, the Fechter version, and has, by arrangement with and in the presence of counsel for both parties, witnessed a representation of the defendant's motion picture play. Inextricably interwoven into the photo-play are the principal and most striking incidents original with the Fechter version and found only in the Fechter version of the play. A person witnessing a performance of the photo-play, and familiar with the Fechter version, will readily recognize it and the story as told in the Fechter version is told in the photo-play in substantially the same order and sequence. Over fifty of the characters omitted from the novel by Fechter in preparing his version are also omitted in the photo-play. Scenes selected from the novel by Fechter are used in the photo-play in the same way and as used in the Fechter version and the scenes omitted in the Fechter version are omitted in the photo-play. Words used only in the Fechter version and not found in the novel are flashed upon the screen in connection with the performance of the photo-play and are a part of the films used to give the exhibition, and said words are used by the characters and in connection with incidents originated by Fechter in his dramatization, and not found in the novel, as used in the Fechter version. While there are in the photo-play,

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and especially in the earlier part, scenes that are not found in the Fechter version, practically every great dramatic climax, original in the Fechter version and not found in the novel or in any of the earlier versions, is reproduced in the photo-play. It would extend this opinion to undue length to set forth in detail an analysis of these striking similarities. A comparison of the Fechter version and the photo-play with one another and with the novel and earlier versions leaves no doubt that the Fechter version was used for the production of the photo-play and that in the photo-play the defendant has appropriated that which gave the Fechter version its dramatic value and its success. The learned counsel for the defendant has, with industry and skill worthy of a better cause, prepared an elaborate analysis pointing out innumerable instances of scene and incident in the photo-play that are to be found in the novel and in the earlier versions, and many that are not found in the Fechter version. It is of course not unnatural that these instances of similarity between the photo-play and the novel and the other dramatic versions, including Fechter's, should exist, and prove nothing, for Fechter's version was dramatized from the novel, though changed, rearranged, condensed and strengthened as above noted. In a case of this sort what attention should be focused upon are the striking instances of similarity between the photo-play and the Fechter version that are found in the novel or in the earlier versions" (fols. 914-920).

(See also cross-examination of Pribyl, fol. 485; also fols. 507, 528.)

The infringing photo-play was prepared for the defendant by one of its employees, Colin Campbell (fols. 485, 528) who was still in its employ at the

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time of the trial, *but he was not called by the defendant, so that he could not be cross-examined as to the source from which he took the scenes, characters and incidents found in the photo-play, nor was his testimony taken by commission.*

Referring to the failure to call this witness, the learned judge below said:

"Where, as here, a party charged with literary piracy claims to have gone to the common source and does not produce the man who did the work for him, so that he may be cross-examined as to the sources from which he took his work and account for the singular coincidences found in the piratical copy and complainant's work, a Court of Equity needs little additional proof on the question of piracy. If characters, incidents, omissions or additions are found in the complainant's dramatization, not found in the published book or common source, then in the absence of a convincing explanation, the Court is justified in finding, and invariably does find, that the complainant's work has been infringed (*French v. Connelly*, 1 Week. Dig., 196; *Frank Shepard Co. v. Taylor Pub. Co.*, 193 Fed., 991; *White v. Bender*, 185 Fed., 921, 925)" (fols. 921, 922).

A dramatization of a published book or novel is entitled to the same protection as an original work. No one may infringe that dramatization.

Daly v. Byrne, 43 N. Y. Sup. Ct., 261;
Drone on Copyright, 596;
Fleron v. Lackaye, 14 N. Y. Supp., 292.

This, however, does not prevent another person making an independent dramatization *from the common source, without using or resort-*

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ing to the complainant's dramatization. It is usual for defendants, in actions of this character, to assert that they went to the original source for their work, without reading or copying from the complainant's work. Therefore, a test has been laid down by the courts in cases of this kind, to settle the question of piracy. This test, by experience, has been found to be almost infallible and it is this: *If characters, incidents, omissions or additions are found in the complainant's dramatization, not found in the published book or common source, then in the absence of a convincing explanation, the court invariably finds that the complainant's work must have been infringed, or else why the same characters, incidents, omissions or additions in both the complainant's dramatization and defendant's production, not found in the common source?*

Thus, in the more common cases of dictionaries, directories, books of annotations, citations, or tables of cases (which any person may prepare), if there are similar errors or additions found in the two works, the court finds the fact of piracy against the defendant, unless he can satisfactorily explain how the same omissions, additions or errors appeared in his work and the complainant's work.

In *French v. Connelly*, 1 Week. Dig., 196, Jules Verne had written a story "*Around the World in Eighty Days*." He afterwards wrote a play, giving it the same name. Defendants produced a play of the same title, and claimed that their play was a dramatization of the original story of Verne, which was common property. The court held that the difficulty with defendants' claim was that their play contained what was not found in

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the original story, but was found in the plaintiff's play, and unless it had been taken from the play, it could not be satisfactorily accounted for.

"We think that the proof of a considerable number of errors, common to both publications, occurring first in the complainant's, and none occurring first in the defendant's, created a *prima facie* case of copying by the defendant, which it was bound to explain." (Italics ours.)

Frank Shepard Co. v. Zachary P. Taylor Publishing Co., 193 Fed., 993.

That case related to Shepard's citations, in which there were twenty-nine errors found in the volumes of the reports published after July 1, 1906 (which occurred first in complainant's publication; see p. 993). Twenty-nine errors are not many in citations covering a number of years of New York reports, but still it was enough to satisfy the court that the defendant's citations were not the result of independent work by resorting to the common source—the reports themselves—but the taking of complainant's annotations.

So, where an author of a law book fails to cite cases which the complainant, in his publication, omitted to cite, it is evidence of copying.

The Court said in *White v. Bender*, 185 Fed., 921, at p. 925:

"If other cases have been decided on the same points, and the later writer does not give them, it is persuasive evidence of copying. If a case has been overruled or reversed, or if an error appears in the citation, and the fact that the case has been overruled or reversed is not noted, or the error is not cor-

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rected, this, too, is evidence of mere copying."

The court called attention to the fact that upon a condensed statement of the principles decided in that case, the defendant used substantially the language found used by the complainant in his condensed statement. *Id.*, p. 924.

In a suit to enjoin the publication by defendant of cuts copyrighted by complainant, where it is proven that the defendant has copied one or more of the copyrighted cuts, a finding that the others, as to which no explanation is made, were also copied, is supported by the evidence.

Da Prato Statuary Co. v. Giuliani Statuary Co., 189 Fed. Rep., 90.

It is now in order for us to take up a few only of the similarities between the Fechter version and the defendant's performance. We need not go into great detail to bring this case within the principle of the authorities cited, *because of the failure of the defendant to call Collin Campbell*, and the witnessing by the trial judge of the infringing photo-play, but we cannot refrain from showing the glaring piracy apparent from a consideration of Dumas' book, the Fechter version and defendant's photo-play.

The only successful dramatization ever produced was the Fechter version (fol. 87).

Dumas' dramatization consisted of four parts, each covering 122 to 144 printed pages, with 20 acts, 37 tableaux, 221 scenes and 59 characters. It took *four days to perform*, because only one part could be performed a night. Of course, that was impossible, and the play was only produced a very few nights.

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French's Acting Edition (which was formerly known as Lacey's, hereafter referred to as the Lacey version) consisted of five acts, 17 scenes, 26 characters, and closely follows the novel (see Deft's Exhibit 5, fol. 623).

Lacey's version has not been produced for many years, being too long and cumbersome and requiring too many changes and scenes.

The Fechter version *does not follow the book*, except down to the time of the escape of Dantes from the Chateau d'If.

First as to the characters:

Fechter's version has 14 important characters (see manuscript).

Lacey's version *has 9 more characters* (Deft's Exhibit 5, fol. 623).

Dumas' novel has more than 70 characters; Dumas' adaptation has 59 characters.

In the Fechter version, while the names of the characters are largely retained, the purposes for which they are introduced and their actions and conduct are materially changed.

At every climax Fechter differs from the novel and the other versions.

What must be conclusive, under the authorities respecting the test of infringement, is *that every change that Fechter made in his version and every mark of differentiation between it and that of the Dumas or Lacey version, is found in the motion picture exhibition.*

We will take a dozen instances at random, which will be sufficient to emphasize our argument.

(1) In the book the character Noirtier is the father of Villefort, and appears only in one scene,

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before Dantes' escape from prison. After that he is only seen as an old paralytic man.

Fechter makes Noirtier a young man, the half-brother of Villefort, a little older than Villefort, and *has him appear in practically every scene*, making his character only a little less important than that of Edmond Dantes himself, the principal character, who subsequently becomes the Count of Monte Cristo.

The pictures do precisely the same thing.

(2) In the book Mercedes marries Fernand within a year or so after Dantes' imprisonment, and Albert is their son.

Fechter changes this and makes Albert the son of Mercedes and Dantes—*not Mercedes and Fernand*.

The pictures do exactly the same thing.

(3) In the book Caderousse is a tailor by trade; afterward he keeps the Inn of the Pont du Gard; he is a murderer and thief, and an escaped galley slave. He is murdered by Cavalcante, the illegitimate son of Villefort and Madame Danglars.

Fechter changes the character so as to have him a tavern keeper, an honest man and a friend of Dantes.

The same is shown in the pictures.

(4) In the book Caderousse is an accomplice of LaCarconte in murdering the peddler Joannes (see novel, Plaintiff's Exhibit D., p. 198 of record).

Fechter has him endeavoring to *prevent the murder*.

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The pictures follow Fechter.

(5) In the book Fernand commits suicide at his home. This occurs about the middle of the story.

Fechter has him commit suicide in the woods at Vincennes *at the end of the play*. *So it is in the pictures.*

(6) In the book Danglars robs his depositors, flees to Rome and is captured by bandits at Dantes' instigation. They starve him until he gives up the stolen money, when he is released (see novel).

Fechter makes it dramatic by having him killed in a duel with Monte Cristo. *So it appears in the pictures.*

(7) Fechter has Noirtier appear throughout the play and act as the second of Dantes in his duel in the last act, when Monte Cristo kills Danglars.

This appears nowhere in the book. *The pictures follow the Fechter version.*

In all these incidents Dumas' adaption and Lacey's version follow the novel.

(8) Fechter wrote a scene of the imprisonment of Dantes in the Chateau d'If, in which Villefort visits the prison, and Dantes hears the conversation between Villefort and the Governor of the prison.

There is no scene or incident in the book or French's adaptation or Dumas' dramatization such as Fechter creates.

The novel does describe the visit of an inspector, whose voice is overheard by Dantes, while in prison.

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The plaintiff's play and the defendant's picture substitute Villefort for the inspector, and in order to give effect to this dramatic incident, an announcement is thrown on the screen exhibition of the photo-play, that *Dantes recognizes Villefort's voice*. Anyone familiar with the novel will appreciate the dramatic importance of this substitution of characters.

(9) In the same scene of the play Abbe Faria tells Dante how to escape. He explains to him that in the event of death the body is sewn in a sack and thrown into the sea; Dante can take the Abbe's place in the sack and the Abbe hands Dante a knife so that he can use it to rip open the bag after he is thrown into the water.

This incident of the Abbe telling Dantes how to escape is not found in the book or in any version or adaptation other than in Fechter's, and is found in the picture.

In the book there is an incident of the Abbe handing Dantes a number of things, including a knife, ink and pens which the Abbe made while in prison. This takes place in the book just after Dantes comes into the Abbe's cell for the first time, and years before the death of the Abbe and Dantes' escape. In the play, the incident of handing Dantes the knife, in order to rip open the bag in which his body is sewn, takes place as the Abbe is dying, just before Dante's escape.

Strange, is it not, if Fechter version was not copied, that this same substitution should be found in the pictures, and that the knife incident is placed, not as found in the book, but at the time, under the circumstances and in the way originated

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by Fechter to make the scene dramatic and effective and more theatrical?

(10). Fechter wrote a strong scene in which the Abbe gives Dante a paper showing where the treasure is hidden. In the book the incident is placed as the Abbe reading the paper over and over again to Dantes, until he memorizes it, but at no time gives it to Dantes.

The pictures follow the Fechter version by having the paper handed to Dantes.

(11) One of the strong scenes in the play is when Dantes is thrown into the water, and with the knife which the Abbe gave him, cuts open the bag in which he has been sewn, swims to a rock, climbs up on it, and throwing his hands above his head, cries: "The World is Mine," and the curtain falls.

These words, "The World is Mine," have been practically a trade-mark used in connection with the Fechter version.

The pictures show the scene precisely as given in the play, and to make it more effective, the words, "The World is Mine," are thrown upon the screen just as they are used by Dantes in the play, at the same place and as part of the same incident (fol. 443).

No such scene appears in the book or in any version of the play excepting Fechter's.

The defendant, says this is found in Duma's adaptation and in Lacey's version. In Lacey's version, Dantes, on his visit to the Inn of the Pont du Gard, speaking to Caderouse, says: "The treasures of the Spada were hidden in the grottos of 'Monte Cristo,' and are now mine," and in Dumas'

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adaptation, Dantes, when he finds the *treasure on the Island of Monte Cristo*, says: "Faria spoke the truth, the treasure of the Spada is mine! The World is Mine!

Nowhere are these words "*The World is Mine*"! used as dramatically as by Fechter just as Dantes draws himself out of the sea and climbs the rock to safety and freedom; nowhere, excepting *in the play and in the picture*, is that incident thus portrayed.

If used as part of a sentence in a scene when Dantes is on the Island of Monte Cristo, looking for the hidden treasure, the incident becomes tame and loses force.

If we had nothing else in the case but this one fact, in the absence of any explanation, the conclusion would be irresistible that the play was staged and the production given by Campbell before the high speed camera, from the Fechter version of Monte Cristo.

(12) Throughout the play Albert is represented as an officer of the French Army. In the novel, however, he does not enter the army *until after his father's death*, which in the play occurs just at the end of the last act. *But the pictures, as the play, represent Albert throughout as an officer in the French Army.*

(13) In the play Albert is portrayed as the son of Mercedes and Dantes, and in the book, as well as in the Dumas and Lacey adaptations, Albert is the son of Mercedes and Fernand.

In the picture, so that there may be no mistake with the audience, these words are thrown on the screen:

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(By Mercedes): "You will not fight him."

(By Dantes): "Why not?"

(By Mercedes): "Because he is your son"

(see page 81).

One can readily picture the dramatic effect of that denouement, *worked into the play for the first time by Fechter*, and, of course, used in the picture.

(14) Fechter, in his version, builds up a strong original scene which takes place at the Inn of the Pont du Gard. He has Villefort attempt to have his half brother Noirtier murdered. For that purpose, Fechter changes the character of Noirtier, from that of an old paralytic man portrayed in the book as Villefort's father, to a young man, the half brother of Villefort, and then has Noirtier call upon Villefort, to inquire about Dantes, during the time Dantes is in prison. In the book Morrel (not Dantes) calls upon Villefort and makes the inquiry.

Fechter has Noirtier visit his half brother, Villefort, and warn him that he must release Dantes within one month and meet him (Noirtier) at the Inn of the Pont du Gard at the expiration of that time. This leads up to the scene at the Inn of Pont du Gard, where Villefort induces LaCarconte (the wife of Caderousse) to attempt murdering Noirtier to get him out of the way.

The photo-play follows this original creation of Fechter to the smallest detail.

In the play, for the first time, is the incident at the Inn of the Pont du Gard, in which Noirtier enters in disguise, and *Villefort commits suicide.*

Nowhere in the book or Dumas' adaptation or Lacey's dramatization does Noirtier appear in

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this scene, nor does Villefort commit suicide at the Inn, *but the act is played precisely this way in the picture*, and that there may be no question about it, there is thrown on the screen, by the defendant, the following: "Learning of Villefort's treachery, attempts to escape under the disguise of a Jewish peddler." Noirtier, so disguised, makes this attempt in the pictures.

Defendant contended below that Noirtier is not shown in disguise in the pictures, but only by means of a separate announcement, as above stated, by words thrown upon the screen.

This is sufficient for us, for it matters not how the audience is told the story, but the fact is that the pictures show Noirtier in a room taking off his disguise as a peddler, and he also appears at the head of the stairs, after killing LaCarconte, *without any disguise*.

(15) Fechter has Caderousse interfere with Villefort who is inducing LeCarconte to kill Noirtier, and Villefort to silence Caderousse picks up a bottle from the table and hits him over the head, knocking him senseless. This does not appear in any other version or adaptation. *The pictures borrow from Fechter*.

(16) *The entire Fourth Act of the play was literally taken by the Selig Company*. Here the scene is laid in the house of Fernand in Paris, and Fechter staged it so as to show conservatories opening off on each side of the salon. Fernand is giving a ball to which Dantes, who is now known as the Count of Monte Cristo, has been invited. When he enters Mercedes recognizes his voice. He talks to Danglars about a letter of credit upon his house, and shows Danglars this letter,

Infringement by Defendant Was Conclusively Established.

who, after reading it, says it is impossible, because it gives unlimited credit. Noirtier, who was then the Editor of the "Imperial," speaks of the Princess whom Dantes has in his household, and Dantes tells the story of how a French officer betrayed her father, stole his fortune and sold his daughter into slavery. Mercedes takes Dantes into the conservatory and offers him grapes, which he refuses. He tells her how he will strike Fernand, not by ruining his fortune or degrading him in the army, *but through his son*. Danglars, Fernand and Albert see the newspaper which tells the story of Fernand's treachery; it is discovered that the paper has been sent to Edmond Dantes and he is charged with its publication. Albert challenges Edmond, Mercedes entering at that moment tells Edmond that he *must not kill Albert because he is his son*.

All these scenes are followed to the letter in the pictures. They do not appear in the same order or in the same connection in the novel or in Lacey's adaptation. The only difference between the pictures and the play is that the girl Haydee appears in the pictures and is represented as denouncing Fernand, and does not appear in the play, but Fechter's ideas and arrangement of scene, incidents, characters and staging are followed in the pictures.

(17) *The last act of the play is a creation of the mind of Fechter*. While it is true the characters are in the book, this must be the case in every dramatization from a novel.

The closing incidents in the Fechter version lead up to an apology on the duelling ground by Albert to Monte Cristo, the suicide of Fernand in

Infringement by Defendant Was Conclusively Established.

the woods, in the hut of a woodcutter, the duel between Monte Cristo and Danglars with Noirtier, Mercedes and Albert present at the duel; all original with Fechter.

In the book Fernand kills himself *in his house*; *Dantes fights no duel with Danglars*.

In Lacey's version *Dantes fights with Fernand*.

But the pictures religiously and closely follow the Fechter version. In the pictures the duel is fought between *Monte Cristo and Danglars*. Albert offers the apology on the duelling ground and Fernand commits suicide in the woods. Where could all this have been taken from by Campbell, who prepared the infringing pictures, if not from the Fechter version?

We have taken these incidents only as a possible explanation why Collin Campbell was not produced by the defendant for cross-examination as to the source from which he took these and other characters, scenes and incidents.

(18) *What is equally significant are the scenes and characters found in the book and not used by Fechter in his version, and most significantly omitted from the photo-play.*

In the novel, there are innumerable incidents of a very forceful dramatic character; the novel covering about 1200 pages. Fechter necessarily had to omit most of these incidents, in order to bring the play within the limits of an evening's performance. He could only select some, and then write his dramatization around those characters and incidents which he thus selected.

Everyone of the incidents, scenes and dramatic situations omitted by Fechter are omitted in the photo-play.

Trial Court Found Infringement After Witnessing Photo-Play.

The only witness the defendant called on the question of infringement was Pribyl, who could not, on cross-examination, account for these coincidences found in the Fechter version and in the photo-play, or explain why the omissions of characters and incidents from the play are absent from the photo-play.

The court stopped the further cross-examination of the witness (fol. 524), after the witness had stated that he was not present when the picture was taken in California (fol. 485); *that he did not know what scenario had been used in taking the picture* (fol. 485); that he had read the novel of "The Count of Monte Cristo" *some years ago* (fol. 519); that he would have to refresh his memory before he could answer questions respecting incidents claimed to be original with Fechter (fol. 516); and that he had *never read the Lacey version through* (fol. 520). He could not answer any question respecting incidents, found only in the Fechter version and the photo-play and not found in the book (fols. 521, 522, 523, 524).

VII

On the question of infringement, the learned judge below, after examining the novel, the Lacey version and the plaintiff's Fechter version, witness an exhibition of the infringing photo-play, in the presence of counsel for both sides (fols. 293, 294, 915, 916), and his conclusion was that "inextricably interwoven into the photo-play are the principal and most

Trial Court Found Infringement After Witnessing Photo-Play.

striking incidents original with the Fechter version of the play. A person witnessing a performance of the photo-play, and familiar with the Fechter version, will readily recognize it and the story as told in the Fechter version is told in the photo-play in substantially the same order and sequence" (fol. 916). This must be persuasive, if not conclusive, here.

This court, in order to be placed in the same position as the learned trial judge, on the question of infringement, should witness an exhibition of the infringing picture, after an examination of the novel and the Fechter version.

VIII.

The judgment appealed from should be affirmed, with costs.

Respectfully submitted,

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Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT.

JAMES O'NEILL,
Plaintiff-Respondent,

against

GENERAL FILM COMPANY,
Defendant-Appellant.

REPLY BRIEF.

1. The decision of this Court on the former appeal from the temporary injunction order herein, mentioned on page 1 of respondent's brief, was accompanied by the following memorandum:

"Per Curiam: Without expressing an opinion as to the right of the plaintiff to recover on the trial, we affirm the order granting the injunction in order to keep the situation as it is until the trial" (155 A. D., 887).

The record on that appeal shows that the question of jurisdiction arising from the copyrighting of a motion picture reproduction of the play under plaintiff's license was not raised.

When the motion for the temporary injunction was argued and submitted, the defendant had no

knowledge of the fact that plaintiff had made a motion picture version of his play and that the same had been copyrighted under his authority between the time of the commencement of this action and the submission of the motion. That fact had been concealed by the plaintiff.

The motion was finally submitted about December 26th, 1912.

At that time both the plaintiff and his attorneys had full knowledge of the fact that the motion picture version of the play made by plaintiff's own performing company, had been copyrighted.

The papers submitted to the Court included the verified complaint and plaintiff's affidavit in which the plaintiff stated that his play had never been copyrighted. That statement was never corrected, although affidavits were submitted by plaintiff after the date of the copyright.

The application for copyright registration was prepared and sent to the Copyright Office by the plaintiff's attorneys. It is dated December 14th, 1912, and claims copyright from December 10th, 1912, which is given as the date of publication. Edwin S. Porter is named as one of the authors of this version (page 201).

On the day when this application was dated, viz.: December 14th, 1912, the plaintiff and Edwin S. Porter swore to affidavits to be submitted to the Court on the pending motion before Mr. John B. Knox, a commissioner of deeds, connected with the office of plaintiff's attorneys.

The application for copyright registration was received in the Copyright Office on December 16th, 1912 (page 202).

An affidavit, verified December 21st, 1912, was submitted to the Court by the plaintiff.

But the copyrighting of said motion picture was not revealed.

2. The statements as to the origin of the plaintiff's version, on pages 2 and 3 of respondent's brief, are incorrect and misleading.

It is not true that the work of preparing a dramatization of Dumas' novel in the form of plaintiff's play was done by Fechter and Leclercq for Cheney in Boston.

The evidence shows that all that work was done in preparing the so-called Webster version which was produced in London in the year 1868, and which was deposited in the Lord Chamberlain's Office by Benjamin Webster.

The facts as to this version are established by the defendant's proposed findings, marked XVI, XVII, XVIII and XXI, which were found by the Court (fols. 133-137).

3. On page 5 of his brief, respondent charges that the defendant has been driven to make a purely technical defense because, through a new definition of the law respecting the use of plays in motion pictures, the defendant has been stripped of its sole defense on the merits. But the point is the product of a too fertile imagination. The case of Edison vs. Lubin, 122 F., 241, and Am. Mutoscope Co. vs. Edison, 137 F., 262, did not hold that motion picture exhibitions are not violative of the dramatic rights in a play.

The decision in Harper vs. Kalem, 222 U. S., 55, was rendered in 1911, and affirmed a decision of the Circuit Court of Appeals for the Second Circuit rendered in 1909.

The pictures distributed by defendant were not made until 1912. As the law was then well settled, the more logical inference is that the defendant distributed these pictures because it was convinced that they did not infringe any exclusive literary property rights.

4. In arguing against appellant's contention that this Court has lost jurisdiction by reason of the copy-righting of plaintiff's own motion picture version of his play, respondent makes a number of incorrect statements as to the facts.

On page 7 of respondent's brief it is said that the defendant's films were hastily scattered to anticipate an injunction. The stipulation of the parties and a finding at folio 104 are cited in support of this statement. But the stipulation shows the fact to be that the distribution of defendant's films took place during a period of three months, between October 14th, 1912, and January 13th, 1913. The finding at folio 104 does not refer to the period or hastiness of the distribution.

It is stated on page 7 that the motion picture film of plaintiff's licensee was only completed about three months after the commencement of the action.

The findings found by the Court establish the fact that the film was completed and offered for distribution on November 1, 1912 (fol. 128).

The action was commenced on November 18th, 1912 (fol. 2).

There is a statement that the motion picture film of the plaintiff's licensee was not exhibited until after the granting of the temporary injunction. The testimony of the plaintiff at folio 228 is

cited. But that testimony was shown to be hearsay (fol. 231).

The respondent says at page 8 of his brief that

"the Famous Players could not sue because the defendant did no overt act after the injunction was issued in this case, and the Famous Players gave no exhibition of its picture until after the injunction, so that the contention of the appellant is that no one has any remedy and no Court jurisdiction."

Every link in this argument is an error. The right of the Famous Players to sue in a Federal Court was in no way affected by the injunction herein, nor by the commission of any overt acts after the granting of the injunction, nor by the exhibition of their own film.

The right of the Famous Players' Company to enforce its rights accrued when it acquired them and when they were violated.

The motion picture rights in plaintiff's play were acquired before November 1st, 1912 (Finding VIII, proposed by defendant, fols. 125, 126).

As long as these rights were not protected by copyright, they could be enforced in the State Courts.

After these rights were protected by copyright, the Famous Players' Company could sue in a Federal Court as to all infringements committed after the copyright was secured.

The defendant distributed its films after that date, and if these films infringe any exclusive rights, they infringe the copyright of the Famous Players' Company.

The copyright of the Famous Players dates from November 1, 1912, when its film was offered to the public. When that was done, it was accompanied by a claim of copyright.

This fact is established by the following advertisement (page 199):

Defendant's Exhibit 1.

"30 Famous
Features
a Year!"

DANIEL FROHMAN

Presents

THE EMINENT
ROMANTIC ACTOR

"30 Famous
Features
a Year!"

JAMES O'NEILL

In His Famous Version of Dumas' Masterpiece,

**"The
Count of
Monte
Cristo"**

The Dramatic Triumph of Three Decades

IN FIVE REELS.

Dumas' Guiding Character, as Portrayed by Its
Greatest Interpreter More Than 5,000
Times on the Stage.

RELEASED NOVEMBER 1st

This production is completely protected by copyright, and any violations or infringements will be prosecuted to the fullest extent of the law. Exhibitors can obtain bookings for this production, as well as past and future releases on the FAMOUS FEATURE PROGRAM, from the authorized exchanges in their respective territories

"30 Famous
Features
a Year!"

**FAMOUS PLAYERS
FILM CO.**

Executive Offices, Times Bldg., N.Y.

ADOLPH ZUKOR,
President.

"30 Famous
Features
a Year!"

The respondent further states on page 8 of his brief that it is not claimed that the plaintiff did any act which ousts this Court of jurisdiction.

The evidence and the findings show that the plaintiff caused the Famous Players' Company to make the picture version of his play and that he authorized them to publish and copyright it.

Finding VIII, proposed by defendant, finds that plaintiff contracted with the Famous Players' Company for a motion picture reproduction of his play (fol. 126).

Finding IX finds that the plaintiff, for the purpose of making such reproduction, engaged a company of performers and gave performances of his play; that *the plaintiff caused to be given*, through said Famous Players' Company motion picture exhibitions of the performances given by him of his play (folios 126, 127).

Finding X finds that for the purpose of having said picture film made plaintiff delivered his play to the stage director of said Famous Players' Company, and that he assisted in the making of said film (fol. 128).

Finding XII finds that said motion picture version of plaintiff's play was copyrighted with plaintiff's consent (fol. 129).

Publication with the consent or license of the author has the same effect as publication by the author.

The respondent further argues on pages 8 and 9 of his brief that the copyrighting of the motion picture version of the play made by plaintiff's licensee does not affect his common law rights, because that photoplay embodies only some portion of the play.

The fact as to what that photoplay represents is settled by the finding found at defendant's request, marked XII, which is as follows:

"XII. That with the consent of the plaintiff the said Famous Players' Motion Picture Company secured copyright in said film by publishing copies of said film adapted to reproduce in motion pictures said play, Plaintiff's Exhibit A, on the 10th day of December, 1912.

Found. C. J. S." (Fol. 129.)

The above finding was not excepted to and is not subject to review. The defendant has a right to rely on it in support of its appeal.

The Court had before it a description of this motion picture version which was filed with the application for copyright registration. This description was admitted in evidence as Defendant's Exhibit 4, and is printed on pages 203-207 of the record. It contains all the features of the plaintiff's play that are of any importance.

The respondent claims support for his contention from the case of Aaronson vs. Finkelstein, 28 F., 75. But the decision in that case was based solely upon the plaintiff's right to the use of the title of an operetta. Incidentally the Court holds that the publication of the songs gave to the public whatever was published (Id., page 77).

Similarly, it was held in the Iolanthe case, 15 Fed., 439, 442:

"But it is a proposition now so well settled as to be almost axiomatic, that except so far as preserved to him by statute, when the composer of any work, literary, musical or dramatic, has authorized its publication in print, his control over so much as he has so published, and of the use which others may make of it, is at an end."

As to the case of Photo Drama Co. vs. Social Uplift Co., 220 F., 448, cited in respondent's brief, it has been shown in appellant's main brief (on pages 16 and 17) that the case rejects the proposition that any common law rights may be preserved in a play after a motion picture version of it has been copyrighted. The United States District Judge had expressed the opinion that common law rights in the play might co-exist with copyright in the photoplay and that as a result the owner of the copyrighted photoplay might get an injunction against the owner of the unpublished play for violation of the copyrighted photoplay, while the owner of the unpublished play might enjoin the violation of his common law rights. The Court of Appeals disagreed with this view of the District Judge (220 F., at page 450).

On pages 10 and 11 of his brief respondent returns to the argument as to the right of the Famous Players' Company to maintain a copyright action. It is now claimed that no infringement could be shown, because the film was not deposited in the Copyright Office until December 18th, 1912, hence the defendant could not have copied the film.

But the action would lie on the ground not that the photographs of the Famous Players' Company were duplicated, but on the ground that the dramatic ideas, situations, incidents, characters, scenery and other features of the photo-drama were appropriated.

Such an action could have been maintained as soon as the film was copyrighted by publication. And publication took place on November 1, 1912. Section 9 of the Copyright Act provides;

"That any person entitled thereto by this act may secure copyright for his work by publication thereof with the notice of copyright required by this act."

And in such an action it would be no defense to show that an action had been brought by the plaintiff in this Court.

In the recent case of *T. B. Harms & Francis, Day & Hunter vs. Stern*, decided Dec. 14, 1915, the United States Circuit Court of Appeals for the Second Circuit held that where the plaintiff seeks to enforce a copyright owned by him,

"the question * * * is one within the exclusive jurisdiction of the Federal Courts, and concerning it no State Court could pass a valid judgment. It is for the Federal Courts alone to pass not only upon the right which the plaintiff asserts but upon the defense which the defendants interpose to the suit."

The case of *German American Coffee Co. vs. Diegl*, 216 N. Y., 57, is not in point. The question there involved was whether an action for the loss sustained by a corporation by the declaration of illegal dividends may be maintained by the corporation itself or by the stockholders. Whoever maintains the action, the same liability of the same directors to the same corporation would be involved, and the Court held that any amount recovered in an action by the corporation could not again be recovered by the stockholders.

No such rule would protect the defendant against double liability in case the Famous Players' Company should sue upon its copyright. The liability claimed by plaintiff for the violation of his own rights could not be offset against the claim of the Famous Players' Company under its motion picture copyright.

6. Respondent argues that the appellant's contention on the question of jurisdiction, if sustained, would deprive a large number of plays of all protection.

It is respectfully submitted that the same argument might be made on the other side of the question. If the owners of unpublished plays may sell their motion picture rights with the right to copyright motion picture versions, and may still retain the right to prosecute motion picture manufacturers and exhibitors for infringing their common law rights by motion pictures, many persons will be unjustly subjected to double liability.

But the respondent's picture of the dire consequences is exaggerated.

The only right that would be lost is the right of play-owners to eat the cake and keep it, to sell the motion picture rights, including the copyright, and yet retain the right to exploit the same rights as part of their common law rights.

7. On pages 16-18 respondent seeks to maintain the claim that the first Fechter version, which was written in London for Webster in 1868, was also acquired by the plaintiff.

But the record shows that the plaintiff did not own the Webster version.

In the complaint it is not claimed that the plaintiff acquired the Webster version. The claim set forth in the complaint is that the plaintiff acquired a dramatization which was made for hire by Fechter and LeClereq while they were employed by Cheney at the Globe Theatre in Boston in the years 1870-1871 (fols. 12, 13).

The findings and the judgment hold that the dramatization made by Fechter and LeClercq was the one acquired by the plaintiff (fols. 73, 86).

The version made by Fechter with the assistance of LeClercq was not the Webster version made in London. LeClercq was not in London, and had nothing whatever to do with the Webster version.

The respondent claims that the Webster version is identical with the plaintiff's play. But the plaintiff's testimony shows the fact to be different. The plaintiff testified:

"The first Fechter version of Monte Cristo at the Adelphi Theatre in London, the curtain descended about half past two in the morning.
* * * This adaptation, however, was not the same adaptation which he afterwards wrote for Mr. Cheney" (fol. 255).

The Webster version had to be shortened, although all the features which the defendant is charged with having appropriated are the same in both versions.

The plaintiff also testifies that he never saw a manuscript or copy of the Webster version.

"Q. I ask you whether you ever saw the 1868 version of the Count of Monte Cristo?
A. No, I never saw that version; that particular copy" (fol. 252).

8. As to the claim that plaintiff acquired exclusive rights by adverse possession.

On page 22 respondent illustrates the theory of adverse possession by supposing that plaintiff had possession of a coat for 30 years.

True, such possession might support a claim of title to that particular coat, because actual possession of a coat is necessarily exclusive possession.

But the possession of one coat would not show that no one else could own an exact duplicate of that coat.

The respondent does not meet the point made in appellant's brief that the possession of the Cheney manuscript does not prove that plaintiff also owned the Webster manuscript (which he never saw) nor the other Fechter manuscript, which Fechter retained with the performing right after Cheney acquired the manuscript which came into plaintiff's possession.

The possession of the Cheney manuscript may prove ownership in that particular book, that is in the material object on which the literary work was printed or typewritten.

But it proves nothing as to the exclusive rights in the contents.

The Copyright Act of 1907 lays down this principle:

"Section 41. The copyright is distinct from the property in the material object copyrighted, and the sale or conveyance by gift or otherwise of the material object shall not of itself constitute a transfer of the copyright."

The principle here stated is applicable to literary property at common law. (Stephens vs. Cady, 14 How., 528, 530.)

In the case at bar the first possessor of the plaintiff's manuscript, Cheney, was not shown to have exclusive performing rights. The Court found:

"XXXVIII. That there is no evidence that Arthur Cheney owned the exclusive right to

publicly perform said play, Exhibit A" (fol. 148).

Under the principle of law above stated no subsequent possessor of Cheney's manuscript who derived his rights from Cheney could acquire an exclusive right that Cheney did not have.

Here is a break in plaintiff's title that would undoubtedly be fatal to the maintenance of a copyright action by the plaintiff's assignee.

9. The respondent's discussion of the publication of certain features of the play by the public exhibition and distribution of pictorial representations of such features does not meet appellant's point.

Among the similarities between the defendant's pictures and plaintiff's play on which most stress is laid, are certain spectacular poses and accompanying exclamations.

One of these features is a picture described in Plaintiff's Exhibit C, as follows:

"The world is mine. The scene shows Dantes standing on a rock in the middle of the sea, his hands outstretched" (pages 193, 194).

This picture is similar to the principal picture on the poster, Defendant's Exhibit 9.

The Court found that these posters and prints were "published and widely circulated and displayed in show windows, on billboards and other public places in various parts of the United States" (fol. 123).

What the defendant did in this and other instances is to make use of these widely published pictures.

This picture does not represent any dramatic action. The dramatic action consisted of the escape of Dantes by allowing himself to be thrown into the water in a sack, cutting the sack open and swimming for an emerging rock. All that is in the novel. After Dantes has reached the rock, he rises and assumes the pose shown in the defendant's picture and in the published poster.

The appellant's contention is that by reason of the publication of that pose through posters and prints, that pose and the words printed with it on the posters and prints became public property.

Respondent's argument does not meet this contention.

10. The respondent argues against the appellant's contention that the Webster version has become public property by claiming, (1) that no one had a right to make a copy of the plays deposited with the Lord Chamberlain, and (2) that the depositing was compulsory and could, therefore, not effect a loss of plaintiff's title to the play.

As to the right to copy the plays deposited with the Lord Chamberlain, there is no evidence to show that copyright is forbidden. The statute does not prohibit it (fols. 716-719). The representative of the Lord Chamberlain merely stated that the manuscript could not be removed and used (fol. 407).

Secondly, the depositing of the play is no more compulsory than was the filing of the plans considered in *Wright vs. Eisle*, 86 App. Div., 356. It was necessary to file the plans in order to enable the architect who was the author to derive any

benefit from them; without such filing the consent of the Building Department to the erection of a building according to the plans could not be obtained. Still, it was within the power of the author to withhold the plans from the public records.

So, in the case of a play under the English statute, 6 and 7 Vict., 68, the filing was only necessary to enable the owner of the play to publicly produce it and thereby reap a profit from it. If he did not care for the profit from the public production, he could withhold the play from the records of the Lord Chamberlain.

The respondent misstates the position of the appellant in saying that from such filing the loss of the owner's title is claimed.

Under the English law the performance which was made possible by filing the play in the Lord Chamberlain's office, secured to the owner a statutory performing copyright for the term of not less than 42 years (Finding, fols. 135, 136).

During the statutory term the owner of the play lost nothing by reason of filing a copy in the Lord Chamberlain's office.

The question is whether that copy upon the expiration of the statutory performing right has not become accessible to the public to be used for the purpose of exercising the right of performing it which now belongs to the public.

The respondent has not answered that question.

11. Respondent's argument on the question of infringement is headed by the incorrect statement that "the infringement was not seriously contested below." (Page 26 of respondent's brief.)

Defendant prepared and submitted to the Court very elaborate descriptions and comparisons for

the purpose of showing that the defendant's pictures did not infringe any important features of the play in which the plaintiff could claim a monopoly.

The Trial Court acknowledged the labor and energy devoted to this part of the defense in the following passage of the opinion:

"The learned counsel for the defendant has, with industry and skill worthy of a better cause, prepared an elaborate analysis pointing out innumerable instances of scene and incident in the photo-play that are to be found in the novel and in the earlier versions, and many that are not found in the Fechter version" (fol. 919).

The description of defendant's pictures and a comparison showing in the form of parallel columns the sources of the pictures are contained in the record on pages 266 to 280.

Other comparisons were submitted to the Trial Court as parts of defendant's brief.

Respondent mentions a number of alleged instances of similarity between the defendant's pictures and the plaintiff's play.

These instances are selected without following the order in which the defendant's pictures are arranged.

As is shown by plaintiff's comparison (Plaintiff's Exhibits C and D) and by defendant's description (Exhibit 25) and by defendant's comparison (Exhibit 26), the defendant's film consists of 3 reels, Reel One with 30 pictures, Reel Two with 39 pictures and Reel Three with 27 pictures.

If the defendant's pictures infringe the plaintiff's play, the similarity must be capable of being traced in these 96 pictures. Instead of so tracing

the similarities, the respondent makes general assertions. How unfounded these assertions are will appear by examining the pictures in their order. (See Defendant's Exhibit 25, pages 266-279.)

Reel One, 30 pictures.

None of these pictures can be shown to infringe any feature that is original with the plaintiff's version.

The respondent claims that the pictures follow plaintiff's play in introducing Noirtier at this stage of the story.

But the pictures introduce Noirtier in a scene occurring a considerable time before the opening of plaintiff's play. Picture I shows Noirtier at the time when the ship Pharoah is about to leave Marseilles on the voyage during which Captain Leclercq dies. In this picture Noirtier hands to Captain Leclercq a letter for Napoleon which the Captain shortly before his death entrusts to Dantes.

This incident is not in plaintiff's play.

The plaintiff's play opens with the return of the ship to Marseilles when Noirtier meets Dantes for the purpose of getting a letter from Napoleon which Dantes was to deliver to Noirtier.

The idea of introducing Noirtier at this stage of the story was not original with the Fechter version, but was borrowed from the Dumas dramatization. In Part I, Act II, Scene VII of the Dumas version Dantes and Noirtier meet and the latter's identity is established by the following dialogue:

"The Unknown: To Mr. —

Edmund: Say half the man's name and I will finish.

The Unknown: To Mr. Noir—

Edmund: Tier.

The Unknown: To Mr. Noirtier, that's it."

This is copied in plaintiff's play as follows:

"Edmund: * * * I have asked your name.
Noirtier: It is for you to halve it and

begin.

Edmund: True—Noir.

Noirtier: Tier." (Page 20 of plaintiff's play.)

One of the pictures, No. 7, merely shows Noirtier speaking to Dantes upon the arrival of the ship.

Two other pictures, Numbers 16 and 17, show Noirtier as being present in the Inn while the letter of denunciation is written.

In plaintiff's play Noirtier appears at the Inn after the letter was written and sent off. (Plaintiff's play, page 18.)

The respondent claims that the pictures follow the play in representing Caderousse as the owner of the Reserve Inn and La Carconte as his wife and proprietress of the Inn. But none of the pictures show either of these facts. (See testimony of Pribyl, fols. 503, 504.)

Reel Two, 39 pictures.

The first part of this reel shows the experiences of Dantes while in the prison, his meetings with the Abbe Faria and his escape by substituting himself for the body of Faria in the burial sack.

The plaintiff's play follows the novel and the earlier dramatizations in every important respect. The pictures follow the same sources.

The one feature of this part of the play which is claimed as an innovation by Fechter, is the circumstance that a visit of inspection is made by

Villefort, while in the novel and the other versions an Inspector makes the visit.

But the fact that such inspection is made and that it leads to the disclosure by Faria to Dantes of the treachery of Villefort, Danglars and Fernand, occurs in the common sources as well as in the play. (Lacy version, Act II, Scene I.)

Originality is claimed for the suggestion by Faria that Dantes save himself by substituting himself for Faria in the burial sack. But that plan was the one actually adopted according to the novel. The furnishing of the knife is found in the Lacy version (page 35) and the delivery of the chart describing the place where the treasure is hidden, is described on pages 115, 116 of the novel, where the knife is also mentioned.

The scene showing Dantes climbing on a rock is not original with plaintiff's version. Nor are the words "The World Is Mine."

These words are taken from the Dumas dramatization where at the end of Part II, Act I, Dantes exclaims:

"The treasure of Spada is mine. *The world is mine.*"

The words "The World is Mine" appear on the poster, Defendant's Exhibit 9.

After picture 69, showing Dantes on the rock, there follow 5 pictures describing the rescue of Dantes by smugglers who take him on board their ship.

These incidents are not in plaintiff's play.

Reel Three, 27 pictures.

The first two pictures of this reel show Dantes on the island of Monte Cristo and the discovery of the treasure.

These incidents are not in plaintiff's play.

The next three pictures show Dantes in Africa with Haydee.

These incidents are not in plaintiff's play.

The pictures describing the incidents at the Inn of the Pont du Guard do so in substantially the same manner as the novel and the earlier versions.

The actions of the jewelry peddler are those of Joannes in the novel. The circumstance that the peddler is Noirtier is unimportant.

The shooting of La Carconte is described in the Dumas dramatization (Part II, end of Act II) and in the Lacy version (page 46).

The participation of Villefort in this episode and his suicide are shown in the poster, Defendant's Exhibit 9.

The closing pictures 91 to 96, describing the experiences of Monte Cristo in Paris and the deaths of Fernand and Danglars, follow the novel and the older versions.

But these pictures differ in an important respect from plaintiff's play in that they introduce Haydee whose father was betrayed by Fernand. She brings about the exposure of Fernand, while in plaintiff's play this exposure is brought about by Noirtier and Haydee does not appear.

The incident of Albert challenging Dantes is found in the Dumas version (Part III, Act III), and in the Lacy version (page 72).

The duel shown in the concluding picture is an imitation of the duel in the closing scene of the Lacy version (pages 76, 77).

The duel scene is shown on the poster, Defendant's Exhibit 9.

Much stress is laid on the fact that Albert is shown to be the son of Dantes. That fact is only shown in one announcement. There is nothing in

the pictures themselves which makes the announcement necessary. As far as the pictures show, there is a conversation between Mercedes and Dantes where Mercedes persuades Dantes not to fight a duel with Albert. The result is that Albert apologizes to Dantes. All that is contained in the novel and in the Dumas version. In the novel Mercedes pleads for her son's life on the ground that Dantes would punish her if he were to kill Albert. This appeal has the same influence on the dramatic action as the statement used in plaintiff's play.

Taking the defendant's pictures as a whole, they differ from the plaintiff's play in their general arrangement as well as in many important details. The occurrence of many similarities is natural from the fact that the story has been treated in many versions that are public property.

The judgment appealed from should be reversed and the complaint dismissed.

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